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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 246

NATIONAL BULK CARRIERS, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on May 8, 1964.

Opinions Below.

The opinion of the District Court for the District of Delaware (R. 235-261) is printed in Appendix B hereto, *infra*, p. 35, and is reported at 214 F. Supp. 585. The opinion of the Court of Appeals for the Third Circuit (R. 266-277) is printed in Appendix B hereto, *infra*, p. 22, and is reported at 331 F. 2d 407.

Jurisdiction.

The judgment of the Court of Appeals for the Third Circuit was made and entered on May 8, 1964 (R. 278), is printed in Appendix B hereto, *infra*, p. 34. The jurisdiction of this court is invoked under 28 U. S. C. Sec. 1254(1).

Question Presented.

The Merchant Ship Sales Act of 1946, 50 U. S. C., App., Sec. 1735-1746 (hereinafter sometimes referred to as the "Act"), provided for the sale of certain vessels owned by the United States Maritime Commission (herein referred to as "Maritime Commission") at the "statutory sales price," as defined in the Act. For an owner of a vessel purchased from the Maritime Commission prior to the date of the Act, the Act stated that, upon application, such owner would be entitled to an adjustment in the price of such vessel under Section 9 of the Act. Petitioner applied for and obtained a reduction in the aggregate purchase price of certain vessels previously purchased by it from the Maritime Commission.

The sole question presented here is whether or not the tax cost basis of vessels purchased by Petitioner prior to the enactment of the Act, and whose original purchase price was "adjusted" downward pursuant to Section 9 of the Act, is the economic investment in the vessels, represented by their original purchase price[1] less the amount of that price adjustment as determined under the provisions of Section 113(a) of the Internal Revenue Code of 1939 (hereinafter referred to as "IRC (1939)") and the

[1] Such original price being correctly adjusted, of course, as required by the Code to reflect transactions prior to the effective date of the price adjustment under the Act.

corresponding Section 1012 of the Internal Revenue Code of 1954 (hereinafter referred to as "IRC (1954)").

Statutes Involved.

The statutory provisions involved are IRC (1939), Sections 23(1) and (n), 113(a) and (b), and 114(a), IRC (1954), Sections 167(a), (g) 1011, 1012 and 1016(a)(1) and (2), 26 U. S. C., and Sections 1735-1746 of the Act, 50 U. S. C., Appendix, pertinent portions of which are printed in Appendix A, *infra*, p. 10.

Statement.

Prior to March 8, 1946, Petitioner purchased three C-2 dry cargo vessels from Maritime Commission at a total purchase price of $7,707,975.12 (R. 107). As of March 7, 1946, Petitioner's proper and recognized adjusted tax cost basis for the vessels under IRC (1939) was $6,602,366.17.[2]

Upon the enactment of the Act, Petitioner made application for an adjustment in purchase price of the three vessels purchased by it prior to March 8, 1946. After this application had been approved by the Maritime Commission, an agreement for an adjustment in the purchase price of the vessels under Section 9 of the Act was entered into by Petitioner and Maritime Commission (R. 116).

The total net adjustment in price under Section 9 of the Act which was applied in reduction of Petitioner's mortgage indebtedness, as set out in the agreement, was

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[2] This total tax cost basis was composed of the following elements:

(1) Cash (R. 130, Line 1)	$ 896,425.01
(2) Tax Cost Basis of Two Vessels traded in (R. 111, Par. 12)	399,391.05
(3) Purchase money mortgage indebtedness (R. 111, Par. 20)	5,306,550.11
Total	$6,602,366.17

determined to be $489,336.89 (R. 111). This adjustment left a balance of mortgage indebtedness on the vessels, as of March 8, 1946, which Petitioner was obligated to pay, of $4,817,213.22 (R. 111). After the adjustment under Section 9 of the Act, Petitioner determined that for Federal income tax purposes, its adjusted cost basis for these vessels, as of that date, was $6,113,029.28.[3]

Petitioner filed claims for refund for the tax years in question (1946 through 1953 and 1955) for the increased taxes paid by it, resulting from the lowered cost basis for depreciation and gain or loss in respect of the three vessels on the more than one million dollars difference between the cost basis as contended for by Petitioner and as recognized and allowed by the Internal Revenue Service.[4] These claims for refunds were disallowed and suit was subsequently filed thereon by Petitioner.

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[3] Actual economic investment and tax cost basis as of 3/7/46 ..... $6,602,366.17

Total adjustment in mortgage indebtedness under Section 9 of the Act ..... (489,336.89)

Actual economic investment and tax cost basis as of 3/8/46 ..... $6,113,029.28

This actual economic investment and tax cost basis as of 3/8/46 consisted of the following elements:

(1)	Cash payments through 3/7/46		$ 896,425.01
(2)	Tax cost basis of vessels orginally traded in		399,391.05
(3)	Purchase money mortgage indebtedness		
	(a) Total at 3/7/46	$5,306,550.11	
	(b) Less adjustment as of 3/8/46	(489,336.89)	
	(c) Adjusted mortgage indebtedness as of 3/8/46		4,817,223.22
	Adjusted tax cost basis		$6,113,029.28

[4] The depreciation was allowed on the statutory sales price of $5,107,796.02 less certain adjustments not here in dispute (R. 111-112.)

Reasons for Granting the Writ.

The decision below should be reviewed because (1) it is in conflict with the decision of the Court of Claims in *Socony Mobil Oil Company Inc., et al.* v. *United States,* 287 F. 2d 910 (1961), rehearing denied, 289 F. 2d 326 (1961), printed in Appendix C hereto, *infra,* p. 70; (2) it erroneously failed to follow the well-established principles for the determination of taxpayer's Federal income tax cost basis, which are codified in IRC (1939) (which provisions are continued substantially unchanged in IRC (1954)), by allowing its interpretation of Section 9 of the Act (a non-tax statute) to govern and modify such principles; and (3) of its far-reaching importance to a major segment of the transportation industry, by reason of the number of taxpayers involved and the amount of tax money involved, both for the Government and the taxpayers.

As in the case of *Massachusetts Trustees of Eastern Gas and Fuel Associates* v. *United States,* U. S. , 12 L. ed. 2d 268 (May 25, 1964), the instant case and the other cases hereinafter cited involve conflicting interpretations of the effect of the Act on tax principles contained in IRC (1939) and IRC (1954), and a considerable number of pending suits or tax refund claims will turn on resolution of this issue.

1. The decisions of the court below in the instant case and of the majority of the Court of Appeals for the Fifth Circuit in *Waterman Steamship Corporation* v. *United States,* 330 F. 2d 128 (C. A. 5, 1964) (herein sometimes

referred to as the "*Waterman Steamship*" case)[5] have been decided adversely to the taxpayers by the Courts of Appeal for the Third and Fifth Circuits, respectively, and are in direct and irreconcilable conflict with the decision of the United States Court of Claims in three cases which were consolidated for trial: *Socony Mobil Oil Company, Inc.* v. *United States, Texaco, Inc.* v. *United States,* and *Mississippi Shipping Co., Inc.* v. *United States,* previously cited herein as *Socony Mobil Oil Company, Inc.* v. *United States, supra.* The Court of Claims subsequently reaffirmed its position on this issue in the unreported decisions in *Texaco, Inc.* v. *United States,* Court of Claims Docket Nos. 97-61, 98-61, 153-61, 154-61, Memorandum Order Granting Plaintiff's Motion for Summary Judgment Without Opinion (December 17, 1962), Final Judgment on calculation of amount entered March 29, 1963. These cases involved the amount of depreciation deductions for years subsequent to those in the original Court of Claims case of *Texaco, Inc.* v. *United States, supra,* but with respect to the same vessels.

The conflict of opinion and authority between the Court of Claims and the instant case and its companion case was recognized by each of the respective Courts of Appeal as their opinions indicate.

This situation presents a very real conflict of opinion and authority, which, if unresolved, will create a serious problem of United States income tax administration, since the position of the Court of Claims, which is favorable to

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[5] The instant case is a companion case to the *Waterman Steamship* case, a copy of which majority opinion by Rives J., concurred in by Hays, J., and the dissenting opinion of Cameron, J., are printed insofar as pertinent hereto in Appendix B, *infra*, pp. 62-69. A petition in the *Waterman Steamship* case is being filed simultaneously herewith.

the taxpayer on this issue, will provide any taxpayer, regardless of geographical location, with a continuously available forum in which a favorable result on this issue seems assured.

2. The essence of the issue is the relationship of the pertinent provisions of IRC (1939) and IRC (1954) and the provisions for adjustment in price under Section 9 of the Act. The opinions of the Delaware District Court and of the Court of Appeals for the Third Circuit, affirming on appeal, contain an extensive discussion of the Act. However, without any detailed consideration of the well-established tax cost basis principles of the Internal Revenue Codes, these courts held, in effect, that taxpayers receiving a price adjustment under the Act have imposed upon them the so-called statutory sales price as their tax cost basis for the vessels involved, even though none of such vessels were sold under the Act and even though that "price" bears no relationship to taxpayers' economic investment in the vessels involved. Both courts relied entirely on their interpretation of the legislative history and purpose of the Act.

The Court of Appeals for the Fifth Circuit, in a very brief majority opinion in the companion case of *Waterman Steamship, supra*, also erroneously failed to consider this relationship and simply cited and followed the decision of the Delaware District Court. The dissenting opinion of Cameron, J., in the Court of Appeals, however, contains a thorough and correct analysis of the relationship between the tax cost basis provisions of the Internal Revenue Codes and the provisions for adjustment in price under the Act.

The Court of Claims, in reaching a contrary result on this issue in the three cases consolidated for trial, *Socony Mobil Oil Company, Inc., et al.* cases, *supra*, correctly analyzed the above relationship in a thorough and carefully reasoned opinion by Madden, J., in which Mr. Justice Reed (sitting by designation), Jones, C. J., and Durfee and Laramore, JJ., concurred.

3. This issue is of far-reaching importance to a major segment of the United States shipping industry. One hundred and ninety-two vessels were sold by the Maritime Commission prior to March 8, 1946, for which applications for adjustment in price under Section 9 of the Act were made.[6] The total adjustments in the purchase prices of these vessels under Section 9 of the Act were approximately $96,300,000.00, of which a substantial portion and a very substantial resultant amount of income taxes are involved in this issue. In addition to the instant case and its companion case, and four other reported cases, the following are the known pending cases which involve this same question and which could be finally resolved by a decision on this point: *Keystone Tankship Corporation* v. *United States*, U. S. Court of Claims, Docket No. 240-61; *Moore-McCormack Lines, Inc.* v. *United States*, U. S. Court of Claims, Docket No. 286-62, *Moore-McCormack Lines, Inc.*, Tax Court of the United States, Docket No. 2887-62, and *United States Lines Co.*, Tax Court of the United States, Docket No. 1247-62. It is believed that a substantial number of other taxpayers are likewise faced with this same question but have not yet instituted litigation in the

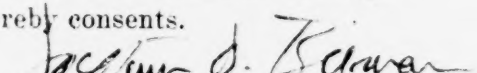
[6] Hearings Before a Subcommittee of the Committee on Interstate and Foreign Commerce of the Senate, 81st Cong., 2d Sess., Pt. 4, pp. 993-996.

courts because returns have been held open pending adjudication of this question.

The issue is also a continuing one, inasmuch as it may be raised annually by Respondent in respect of each taxpayer who has received a price adjustment under the Act for all tax years during the useful or economic lives of the vessels involved. Witness the experience of Texaco, Inc., as reflected in the unreported cases of *Texaco, Inc.* v. *United States, supra,* of being required to litigate its right to annual depreciation expense deductions for subsequent years after the Court of Claims had previously established the controlling principle for earlier years.

Conclusion.

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted, and that this case and its companion case, *Waterman Steamship,* be heard seriatim or consolidated for argument, to which Petitioner hereby consents.



JACQUIN D. BIERMAN,
Counsel for Petitioner.

July 1, 1964.

APPENDIX A.

Statutes Involved.

INTERNAL REVENUE CODE OF 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * * *

(1) [As amended by Sec. 121(c) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Depreciation.*—A reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—

(1) of property used in the trade or business, * * *

* * * * * *

(n) *Basis for Depreciation and Depletion.*—The basis upon which depletion, exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be as provided in section 114.

* * * * * *

(26 U. S. C. 1952 ed., Sec. 23.)

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property; * * *

* * * * * *

(b) *Adjusted Basis.*—The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided.

* * * * * *

(26 U. S. C. 1952 ed., Sec. 113.)

SEC. 114. BASIS FOR DEPRECIATION AND DEPLETION.

(a) *Basis for Depreciation.*—The basis upon which exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the adjusted basis provided in section 113(b) for the purpose of determining the gain upon the sale or other disposition of such property.

* * * * * *

(26 U. S. C. 1952 ed., Sec. 114.)

INTERNAL REVENUE CODE OF 1954:

SEC. 167. DEPRECIATION.

(a) *General Rule.*—There shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—

(1) of property used in the trade or business, or

* * * * * *

(g) *Basis for Depreciation.*—The basis on which exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the adjusted basis provided in section 1011 for the purpose of determining the gain on the sale or other disposition of such property.

* * * * * *

(26 U. S. C. 1958 ed., Sec. 167.)

SEC. 1011. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis (determined under section 1012 or other applicable sections of this sub-

chapter and subchapters C (relating to corporate distributions and adjustments), K (relating to partners and partnerships), and P (relating to capital gains and losses)), adjusted as provided in section 1016.

(26 U. S. C. 1958 ed., Sec. 1011.)

SEC. 1012. BASIS OF PROPERTY—COST.

The basis of property shall be the cost of such property, except as otherwise provided in this subchapter and subchapters C (relating to corporate distributions and adjustments), K (relating to partners and partnerships), and P (relating to capital gains and losses). The cost of real property shall not include any amount in respect of real property taxes which are treated under section 164(d) as imposed on the taxpayer.

(26 U. S. C. 1958 ed., Sec. 1012.)

SEC. 1016. ADJUSTMENT TO BASIS.

(a) *General Rule.*—Proper adjustment in respect of the property shall in all cases be made—

(1) for expenditures, receipts, losses, or other items, properly chargeable to capital account, but no such adjustment shall be made—

(A) for taxes or other carrying charges described in section 266, or

(B) for expenditures described in section 173 (relating to circulation expenditures),

for which deductions have been taken by the taxpayer in determining taxable income for the taxable year or prior taxable years;

(2) in respect of any period since February 28, 1913, for exhaustion, wear and tear, obsolescence,

amortization, and depletion, to the extent of the amount—

(A) allowed as deductions in computing taxable income under this subtitle or prior income tax laws, * * *

* * * * * * *

Merchant Ship Sales Act of 1946, c. 82, 60 Stat. 41:

Sec. 3. As used in this Act the term—

(a) "Commission" means the United States Maritime Commission.

(b) "War-built vessel" means an oceangoing vessel of one thousand five hundred gross tons or more, owned by the United States and suitable for commercial use—

(1) which was constructed or contracted for by or for the account of the United States during the period, beginning January 1, 1941, and ending with September 2, 1945; or

(2) which having been constructed during the period beginning September 3, 1939, and ending with September 2, 1945, was acquired by the United States during such period.

(c) "Prewar domestic cost," as applied to any type of vessel, means the amount determined by the Commission, and published by the Commission in the Federal Register, to be the amount for which a standard vessel of such type could have been constructed (without its national defense features) in the United States under normal conditions relating to labor, materials, and other elements of cost, obtaining on or about January 1, 1941. In no case shall the prewar domestic cost of any type of vessel be considered to be greater than 80 per centum of the domestic war cost of vessels of the same type.

(d) "Statutory sales price," as applied to a particular vessel, means, in the case of a dry cargo vessel, an amount equal to 50 per centum of the prewar domestic cost of that type of vessel, and in the case of a tanker, such term means an amount equal to 87½ per centum of the prewar, domestic cost of a tanker of that type, such amount in each case being adjusted as follows:

(1) If the Commission is of the opinion that the vessel is not in class, there shall be subtracted the amount estimated by the Commission as the cost of putting the vessel in class.

(2) If the Commission is of the opinion that the vessel lacks desirable features which are incorporated in the standard vessel used for the purpose of determining prewar domestic cost, and that the statutory sales price (unadjusted) would be lower if the standard vessel had also lacked such features, there shall be subtracted the amount estimated by the Commission as the amount of such resulting difference in statutory sales price.

(3) If the Commission is of the opinion that the vessel contains desirable features which are not incorporated in the standard vessel used for the purpose of determining prewar domestic cost, and that the statutory sales price (unadjusted) would be higher if the standard vessel had also contained such features, there shall be added the amount estimated by the Commission as the amount of such resulting difference in statutory sales price.

(4) There shall be subtracted, as representing normal depreciation, an amount computed by applying to the statutory sales price (determined without regard to this paragraph) the rate of 5 per centum per annum for the period beginning with the date of the original delivery of the vessel by its builder

and ending with the date of sale or charter to the applicant in question, and there shall also be subtracted an amount computed by applying to the statutory sales price (determined without regard to this paragraph) such rate not in excess of 3 per centum per annum in the case of a vessel other than a tanker, and not in excess of 4 per centum per annum in the case of a tanker, for such period or periods of war service as the Commission determines will make reasonable allowance for excessive wear and tear by reason of war service which cannot be or has not been otherwise compensated for under this subsection.

No adjustment, except in respect of passenger vessels constructed before January 1, 1941, shall be made under this Act which will result in a statutory sales price which (1) in the case of dry-cargo vessels (except Liberty type vessels) will be less than 35 per centum of the domestic war cost of vessels of the same type, (2) in the case of any Liberty type vessel will be less than 31½ per centum of the domestic war cost of vessels of such type, or (3) in the case of a tanker will be less than 50 per centum of the domestic war cost of tankers of the same type. For the purposes of this Act, except section 5, all Liberty vessels shall be considered to be vessels of one and the same type.

(e) "Domestic war cost" as applied to any type of vessel means the average construction cost (without national defense features) as determined by the Commission, of vessels of such type delivered during the calendar year 1944, except in case of any type of vessel the principal deliveries of which were made after the calendar year 1944, there shall be used in lieu of such year 1944 such period of not less than six consecutive calendar months as the Commission shall find to be most representative of war production costs of such type.

(f) "Cessation of hostilities" means the date proclaimed by the President as the date of the cessation of hostilities in the present war, or the date so specified in a concurrent resolution of the two Houses of the Congress, whichever is the earlier.

(g) "Citizen of the United States" includes a corporation, partnership, or association only if it is a citizen of the United States within the meaning of section 2 of the Shipping Act of 1916, as amended. The term "affiliated interest" as used in sections 9 and 10 of this Act includes any person affiliated or associated with a citizen applicant for benefits under this Act who the Commission, pursuant to rules and regulations prescribed hereunder, determines should be so included in order to carry out the policy and purposes of this Act.

(50 U. S. C. Appendix 195 ed., Sec. 1736)

Sec. 9. (a) A citizen of the United States who on the date of the enactment of this Act—

(1) owns a vessel which he purchased from the Commission prior to such date, and which was delivered by its builder after December 31, 1940; or

(2) is party to a contract with the Commission to purchase from the Commission a vessel, which has not yet been delivered to him; or

(3) owns a vessel on account of which a construction-differential subsidy was paid, or agreed to be paid, by the Commission under section 504 of the Merchant Marine Act, 1936, as amended and which was delivered by its builder after December 31, 1940; or

(4) is party to a contract with a shipbuilder for the construction for him of a vessel, which has not yet been delivered to him, and on account of which a construction-differential subsidy was agreed, prior to

such date, to be paid by the Commission under section 504 of the Merchant Marine Act, 1936, as amended:

shall, except as hereinafter provided, be entitled to an adjustment in the price of such vessel under this section if he makes application therefor, in such form and manner as the Commission may prescribe, within sixty days after the date of publication of the applicable prewar domestic costs in the Federal Register under section 3(c) of this Act. No adjustment shall be made under this section in respect of any vessel the contract for the construction of which was made after September 2, 1945, under the provisions of title V (including section 504) or title VII of the Merchant Marine Act, 1936, as amended.

(b) Such adjustment shall be made as hereinafter provided, by treating the vessel as if it were being sold to the applicant on the date of the enactment of this Act, and not before that time. The amount of such adjustment shall be determined as follows:

(1) The Commission shall credit the applicant with the excess of the cash payments made upon the original purchase price of the vessel over 25 per centum of the statutory sales price of the vessel, as of such date of enactment. If such payment was less than 25 per centum of the statutory sales price of the vessel, the applicant shall pay the difference to the Commission.

(2) The applicant's indebtedness under any mortgage to the United States, with respect to the vessel shall be adjusted.

(3) The adjusted mortgage indebtedness shall be in an amount equal to the excess of the statutory sales price of the vessel as of the date of the enactment of this Act over the sum of the cash payment retained by the United States under paragraph (1) plus the readjusted trade-in allowance (determined

under paragraph (7)) with respect to any vessel exchanged by the applicant on the original purchase. The adjusted mortgage indebtedness shall be payable in equal annual installments thereafter during the remaining life of such mortgage with interest on the portion of the statutory sales price remaining unpaid at the rate of 3½ per centum per annum.

(4) The Commission shall credit the applicant with the excess, if any, of the sum of the cash payments made by the applicant upon the original purchase price of the vessel plus the readjusted trade-in allowance (determined under paragraph 7) over the statutory sales price of the vessel as of the date of the enactment of this Act to the extent not credited under paragraph (1).

(5) The Commission shall also credit the applicant with an amount equal to interest at the rate of 3½ per centum per annum (for the period beginning with the date of the original delivery of the vessel to the applicant and ending with the date of the enactment of this Act) on the excess of the original purchase price of the vessel over the amount of any allowance allowed by the Commission on the exchange of any vessel on such purchase; the amount of such credit first being reduced by any interest on the original mortgage indebtedness accrued up to such date of enactment and unpaid. Interest so accrued and unpaid shall be canceled.

(6) The applicant shall credit the Commission with all amounts paid by the United States to him as charter hire for use of the vessel (exclusive of service, if any, required under the terms of the charter) under any charter party made prior to the date of the enactment of this Act, and any charter hire for use accrued up to such date of enactment and unpaid shall be cancelled; and the Commission shall credit the applicant with the amount that would have

been paid by the United States to the applicant as charter hire for bare-boat use of vessels exchanged by the applicant on the original purchase (for the period beginning with date on which the vessels so exchanged were delivered to the Commission and ending with the date of the enactment of this Act).

(7) The allowance made to the applicant on any vessel exchanged by him on the original purchase shall be readjusted so as to limit such allowance to the amount provided for under section 8.

(8) There shall be subtracted from the sum of the credits in favor of the Commission under the foregoing provisions of this subsection the amount of any overpayments of Federal taxes by the applicant resulting from the application of subsection (c)(1), and there shall be subtracted from the sum of the credits in favor of the applicant under the foregoing provisions of this subsection the amount of any deficiencies in Federal taxes of the applicant resulting from the application of subsection (c)(1). If, after making such subtractions, the sum of the credits in favor of the applicant exceeds the sum of the credits in favor of the Commission, such excess shall be paid by the Commission to the applicant. If, after making such subtractions, the sum of the credits in favor of the Commission exceeds the sum of the credits in favor of the applicant, such excess shall be paid by the applicant to the Commission. Upon such payment by the Commission or the applicant, such overpayments shall be treated as having been refunded and such deficiencies as having been paid.

For the purposes of this subsection, the purchase price of a vessel on account of which a construction-differential subsidy was paid or agreed to be paid under section 504 of the Merchant Marine Act, 1936, as amended, shall be the net cost of the vessel to the owner.

(c) An adjustment shall be made under this section only if the applicant enters into an agreement with the Commission binding upon the citizen applicant and any affiliated interest to the effect that—

(1) depreciation and amortization allowed or allowable with respect to the vessel up to the date of the enactment of this Act for Federal tax purposes shall be treated as not having been allowable; amounts credited to the Commission under subsection (b)(6) shall be treated for Federal tax purposes as not having been received or accrued as income; amounts credited to the applicant under subsection (b)(5) and (6) shall be treated for Federal tax purposes as having been received and accrued as income in the taxable year in which falls the date of the enactment of this Act;

(2) [As amended Act of August 6, 1956, c. 1013, 70 Stat. 1068] the liability of the United States for use (exclusive of service, if any, required under the terms of the charter) of the vessel on or after the date of the enactment of this Act under any charter party shall not exceed 15 per centum per annum of the statutory sales price of the vessel as of such date of enactment; and the liability of the United States under any such charter party for loss of the vessel shall be determined on the basis of the statutory sales price as of the date of the enactment of this Act, depreciated to the date of loss, at the rate of 5 per centum per annum: *Provided,* That the provisions of this subsection (c)(2) shall not apply to any such charter party executed on or after the date of enactment of this amendatory proviso; and the Secretary of Commerce is directed to modify any adjustment agreement to the extent necessary to conform to the provisions of this amendatory proviso; and

(3) in the event the United States, prior to the termination of the existing national emergency declared by the President on May 27, 1941, uses such vessel pursuant to a taking, or pursuant to a bareboat charter made, on or after the date of the enactment of this Act, the compensation to be paid to the purchaser, his receivers, and trustees, shall in no event be greater than 15 per centum per annum of the statutory sales price as of such date.

(d) Section 506 of the Merchant Marine Act, 1936, as amended, shall not apply with respect to (1) any vessel which is eligible for an adjustment under this section, or (2) any vessel described in clause (1), (2), (3), or (4) of subsection (a) of this section, the contract for the construction of which is made after September 2, 1945, and prior to the date of enactment of this Act.

(50 U. S. C. Appendix 1952 ed., Sec. 1742)

APPENDIX B.

Opinions and Judgment Below and Related Opinions.

(Filed May 8, 1964.)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14,483

NATIONAL BULK CARRIERS, INC.,

Appellant,

v.

UNITED STATES OF AMERICA,

No. 14,484

NATIONAL BULK CARRIERS, INC.,

v.

UNITED STATES OF AMERICA,

Appellant.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE.

Argued December 5, 1963

Before STALEY, GANEY and SMITH, Circuit Judges.

By STALEY, Circuit Judge.

The primary question posed by these appeals is whether the district court correctly determined the cost basis for tax purposes of three vessels purchased by the plaintiff

from the United States, the prices of which were adjusted pursuant to the Merchant Ship Sales Act of 1946, 50 U. S. C. Appendix §§1735-1746 (1958 ed.). The district court held that the cost basis of these vessels is their "statutory sales price" as computed under the Act, rejecting the plaintiff's contention that all of the adjustments and credits referred to in §9(b) of the statute, 50 U. S. C. Appendix §1742, must be applied to determine the proper cost basis. 214 F. Supp. 585 (D. Del. 1963).

The operative facts have been stipulated and are fully summarized in the opinion of the district court. Accordingly, they will be repeated here only in such brief outline form as is essential to a determination of the issues raised in this court.

The plaintiff purchased the vessels in question during the Second World War at a price of $7,707,957.12[1]. A portion of this price was paid from an allowance for two vessels traded in at the time of the purchases. The new vessels were then chartered by the Government, and on its Federal tax returns plaintiff reported this charter-hire as income for the years in which it was received, in addition to making depreciation deductions for the vessels. Following the enactment of the Merchant Ship Sales Act of 1946, the plaintiff applied for a price adjustment under §9 of the statute.

The adjusted "statutory sales price" of the three vessels as computed in accordance with §3(d) was $5,107,796.02[2]. Accordingly, under §9(b)(3), the outstanding mortgage indebtedness was reduced by $1,886,619.97. However, §9(b) provides for additional adjustments, more fully discussed later in this opinion, including a credit to the Maritime Commission for all amounts of charter hire

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[1] This amount includes $15,575.12 representing interest on construction progress payments. The Government's counterclaim for the latter amount is treated later in this opinion.

[2] This amount represents the statutory sales price of the vessels, $5,153,899.31, adjusted for gain and loss not recognized by §510(e) of the Merchant Marine Act of 1936. 46 U. S. C. §1160(e) (1958 ed.).

paid for the use of the vessels prior to the date of the Act, a credit to the applicant for charter-hire he would have received for the use of any vessel traded in at the time of the original purchase, and a recomputation of Federal tax liability based on these adjustments. These additional adjustments resulted in a credit of $1,397,283.08 in favor of the Maritime Commission. This amount was then deducted from the $1,886,619.97 credit due the plaintiff on its mortgage indebtedness, resulting in a net reduction in mortgage indebtedness of $489,336.89. The plaintiff then subtracted that amount from the agreed upon cost basis of the vessels as of the date of the Act, $6,602,366.17 to arrive at $6,113,029.28 as its cost basis under the statute. Its depreciation deductions for the tax years in question, 1946-1953 and 1955, were based on that figure.[3]

The United States, on the other hand, successfully contended in the plaintiff's suit for tax refund in the district court that the proper cost basis of the vessels is their adjusted "statutory sales price," $5,107,796.02, or $1,005,233.26 less than the figure used by the plaintiff. This judgment was premised on the view that the additional adjustments required by §9 were merely intended to eliminate the benefits and detriments of pre-enactment ownership and were not to be considered in determining the cost basis of the vessels.

Section 9(b), 50 U. S. C. Appendix §1742, contains detailed provisions for determining the amount of the price adjustment on prior sales to citizens. We think it inappropriate to set forth that section in its entirety but shall briefly summarize it. The first sentence of the section states that the adjustment in price "shall be made, as hereinafter provided, *by treating the vessel as if it were being sold to the applicant on the date of the enactment of this Act [March 8, 1946], and not before that time.* The amount of such adjustment shall be determined as follows

[3] Of course no contention is advanced that the applicability of the Internal Revenue Code of 1954 to the tax year 1955 affects the issue in this case.

* * *." (Emphasis supplied.) Eight comprehensive paragraphs follow this declaration. Paragraph (1) requires an initial payment of 25% of the statutory sales price of the vessel. Any payments made upon the original purchase price in excess of that amount are credited to the applicant, and if such payments were less than that proportion of the statutory sales price the difference must be paid to the Maritime Commission. Paragraphs (2) and (3) readjust the mortgage indebtedness to an amount equal to the excess of the statutory sales price over the sum retained by the United States under Paragraph (1) plus the readjusted trade-in allowance (computed under Paragraph 7) of any vessel exchanged by the applicant on the original purchase. Thus, these three paragraphs charge the applicant with the statutory sales price of the vessel.

The credit allowed in Paragraph (4) is not applicable to the case at bar. Paragraph (5) credits the applicant with interest for the loss of his investment at the rate of 3½% per annum from the date of the original delivery of the vessel to the date of the Act. Paragraph (6) requires the applicant to credit the Maritime Commission with all amounts paid by the United States as charter hire for the use of the vessel prior to the date of the Act. Conversely, the Commission is required to credit the applicant with the amount of charter hire which would have been paid for the use of any vessel exchanged on the original purchase. Paragraph (7) provides for a readjustment of the trade-in allowance for any vessel exchanged on the original purchase. Paragraph (8) is a detailed tax provision, the effect of which is to recompute the applicant's taxes by disallowing depreciation and amortization on the new vessel for the period prior to the Act; by treating charter hire returned to the Government under Paragraph (6) as never having been received as income; and by treating the interest and charter hire credited to the applicant under Paragraphs (5) and (6) as income in the taxable year of the Act.

It will thus be seen that the statute does not specifically state which figure is to be used as the applicant's cost basis

for depreciation purposes. The plaintiff asserts that the statutory mandate stating "the amount of the adjustment shall be determined as follows" coupled with the ensuing eight paragraphs is a clear indication that all of those paragraphs must be applied to determine its cost basis. The Government argues that the statute was intended to put pre- and post-enactment purchasers on the same basis by establishing a uniform "statutory sales price" for the same class of vessels, and that the provisions of §9 relied upon by the plaintiff were simply intended to effect an unwinding of the prior contract of sale.

An examination of the statutory scheme of §9 together with a study of its legislative history convinces us that the position of the Government is sound. The genesis of the legislation is found in the Committee Reports of both the House and the Senate. H.R. Rep. No. 831, 79th Cong., 1st Sess. 2-3 (1945), U.S. Code Cong. Serv., 79th Cong., 2d Sess. 1086, 1087-1088 (1946); S. Rep. No. 807, 79th Cong., 1st Sess. 1-2 (1945). These reveal a Congressional purpose to avoid the catastrophic economic conditions in the maritime industry which followed World War I when the United States disposed of its merchant vessels without prescribing the price at which they were to be sold. As a result prices declined severely, and those who had previously purchased vessels at higher prices faced bankruptcy. The method devised by Congress to avoid a recurrence of this situation after World War II was the establishment of a "statutory sales price" for each class of vessels. With regard to the plight of those who had purchased vessels at inflated prices prior to the enactment of the bill, the House Report states:

> "These purchasers will suffer an unwarranted discrimination unless the price at which they purchased or agreed to purchase these vessels is adjusted to conform to the statutory sales price prescribed in the bill. There would be nothing more demoralizing to a floor price on war-built vessels than to fail to make this adjustment, even though it involves relatively large amounts of

money. The effect of making the adjustment is the same as if the bill had been enacted at the beginning of the war period and all sales during the war period had been at the statutory sales price.

"The amount of the adjustment (sec. 9) in each case is first applied to reduce any mortgage indebtedness to the Commission on the vessel, and the balance, if any, is refunded to the purchaser.

"*As a condition to receiving an adjustment under this provision of the bill, the purchaser must agree to treat the sale for all purposes as if it had been made under the bill*, for the bill requires that the charter hire charged to the United States for bareboat use of the vessel since the sale must be readjusted to an amount equal to 15 percent per annum of the readjusted price. * * * These counter adjustments in favor of the United States will of course substantially lessen the gross effect of readjusting the prior sales price down to the statutory sales price provided in the bill." (Emphasis supplied.) U.S. Code Cong. Serv., 79th Cong., 2d Sess., at 1097-1098 (1946).

The Senate Report is to the same effect. S. Rep. No. 807, 79th Cong., 1st Sess., at 19. Thus, the original bills in both the House and Senate clearly provided that the price to the pre-enactment purchaser would be the statutory sales price, but, as a condition to receiving this adjustment, counter adjustments in favor of the Government would be required.

Section 9 of the House bill was amended on the floor of that body by a committee amendment offered by Representative Jackson, chairman of the subcommittee which considered the revision. The debate on that amendment is enlightening. Before it was formally offered for consideration on the floor of the House, several committee members made statements which, like the statements in the Committee reports, indicated that pre-enactment purchasers

were to be allowed an adjustment to the statutory sales price, but would be required to make counter adjustments in favor of the Government.[4] Mr. Jackson then submitted the following pellucid explanation of the Committee amendment:

> "There has been a feeling that the amount of the adjustment provided for in section 9 of the bill as reported is to high. The committee amendment seeks to cut down the amount of this adjustment and at the same time to be perfectly fair to all concerned—those who bought before the enactment of the bill, those who bought after the enactment of the bill, and the United States.
>
> "The committee amendment treats all of these prior sales as being made on the date of the bill's enactment and not before that time, so that the previous purchaser and a future purchaser will be put on exactly the same basis. In order to accomplish this result it is necessary to "unwind" a previous transaction, and most of the provisions of the committee amendment which appear complicated are the provisions describing how this unwinding is to be done. [There follows a discussion of the eight paragraphs finally enacted into law.]
>
> "These are the provisions which the amendment includes for the purpose of unwinding the previous transaction. The basic principle of the amendment is very simple—the previous transaction is to be looked

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[4] These statements appear at 91 Cong. Rec. 9182-9185 (1945) (remarks of Rep. Jackson); 9194 (digest of Rep. Bonner); 9196-7 (remarks of Rep. Hale); 9199 (remarks of Rep. McConnell). Typical of these comments were those of Rep. Hale:

"Then in section 9 of the bill we have provided that a citizen who has bought a war-built ship since December 31, 1940, may readjust the transaction in such a way that it may be deemed to have occurred at the time of the enactment of this bill. That is to say, we scale down the price which he paid to the price which he would have paid under this bill, and make corresponding adjustments with respect to charter hire, depreciation, and so on. * * *" 91 Cong. Rec. 9197.

upon as having taken place not when it actually did but as taking place on the date of the bill's enactment and subject to all of the bill's provisions. The amendment reduces the amount of the adjustment under section 9 substantially and is fair to all concerned." 91 Cong. Rec. at 9282 (1945).

The differences in the House and Senate bills were resolved by a Conference Committee of both houses. The relevant portion of the report of that Committee follows:

Adjustment of Prior Sales to Citizens

* * * * * *

"Both the House bill and the Senate amendment provided for (1) adjustment of the original purchase price, (2) adjustment of the charter hire, (3) adjustment of trade-in allowances in connection with the prior original purchase, and (4) adjustments of taxes paid on account of ownership of the vessel.

"Under the House bill the owner would receive as an adjustment the difference between the statutory sales price of the vessel computed as of the date of enactment of the act and the price he originally paid for the vessel. The owner would return all charter hire previously received or allowed by the Government during his ownership of the vessel. The owner would be allowed 3½ percent interest on his original purchase price (but where there was a trade in, only on the difference between his original purchase price and the allowance under the trade in). Under the House bill where the original purchase involved the trade in of an old vessel, the trade in allowance is adjusted in accordance with the trade in standards prescribed under section 8 of the House bill (top limit of 10 percent of the war cost). The owner would be allowed charter hire on the traded in vessel.

"Under the Senate amendment the owner would receive as an adjustment the difference between the original price (depreciated at 5 percent plus 3 or 4

percent war service) and the statutory sales price for the vessel determined as of the date of enactment of the measure. Under the Senate amendment the owner would return the difference between the charter hire he received from the Government while he owned the vessel and the charter hire he would have received had the price of the vessel been the adjusted price arrived at under the act. Under the Senate amendment the owner would receive credit for the interest he actually paid to the Government on the deferred account of his original purchase price. The Senate amendment also provides for an adjustment of the trade in allowance for a vessel traded in on the original purchase, in accordance with section 8 of the Senate amendment (which prescribes a top limit of one-third of the unadjusted statutory sales price). Under the Senate amendment no provision is made for allowance for charter hire of the traded in vessel.

"The conference agreement restores the House provisions on the points stated in the two preceding paragraphs." Conf. Rep. No. 1526, 79th Cong., 2d Sess. 17 (1946).

We think that the foregoing legislative materials and statutory scheme clearly manifest a Congressional intention to effect a recession of the prior contract of sale and an adjustment in price to the statutory sales price. Indeed, it would be difficult to find more perspicuous language to accomplish an "annulling or abrogation or unmaking of contract and the placing of the parties to it in status quo." Black's Law Dictionary, Fourth Ed., 1951, defining "Rescission of Contract." The necessary consequence of this view of the legislation is that the district court correctly determined the cost basis of the plaintiff.[5]

[5] This disposition makes it unnecessary for us to consider the alternative argument of the Government that interest, charter hire and taxes are not capital items and therefore are not includible in a computation of cost basis.

The plaintiff admits that the original bills in both houses of Congress equated the adjusted price to the statutory sales price. The plaintiff argues, however, that the amendment offered on the floor of the House and subsequently enacted into law rejected this approach in favor of the "formula theory" contained in the eight paragraphs of §9. The flaw in this argument is that it is clearly based on a misreading of the legislative history. For, as we have seen, each of the original bills required additional adjustments in favor of the Government as a condition to receiving an adjustment in price. The purpose of the amendment was simply to provide a more equitable unwinding of the original contract of sale.[6]

The plaintiff relies on the legislative history of a subsequent bill considered by the Congress which would have provided the relief it now seeks. However, this bill failed of enactment when it was vetoed by President Truman. As the Supreme Court has stated in a similar situation, "If there is anything in these subsequent events at odds with our finding of the meaning of §3, it would not supplant the contemporaneous intent of the Congress which enacted the Lucas Act." Fogarty v. United States, 340 U. S. 8, 13-14 (1950).

In its brief the plaintiff asserts that three other Federal courts have held in its favor on this issue. Socony Mobil Oil Co. *v.* United States, 287 F. 2d 910 (Ct. Cls.

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[6] The plaintiff also argues that under our view of the Act, it would have been in a better tax position had it not applied for an adjustment in price since its cost basis would then have been $6,602,366.17, or $1,494,570.15 more than the adjusted statutory sales price. The argument is that "assuming an effective tax rate of fifty per cent, the tax saving on the aforesaid amount taken as depreciation would be $747,285.07," whereas the net adjustment was $489,366.89. However, the plaintiff was not obliged to apply for an adjustment in price and having done so under §9, its cost basis was reduced to the adjusted statutory sales price.

1961) [a consolidation of three cases]; Barber Oil Corp. v. Manning, 135 F. Supp. 451, (D. N. J. 1955); and Waterman Steamship Corp. v. United States, 203 F. Supp. 915 (S. D. Ala. 1962). Subsequent to the argument of this appeal, however, the decision in *Waterman* was reversed by the Fifth Circuit. United States v. Waterman Steamship Corp., F. 2d (C. A. 5, March 30, 1964). Thus, the rule in the Third and Fifth Circuits is opposed to the view of the Court of Claims.

In its amended answer to the plaintiff's complaint, the Government filed a non-tax counterclaim alleging that $15,575.12 in construction progress interest payments made by the plaintiff on two of the vessels in question were wrongfully credited to plaintiff under §9 of the Act. In addition to requesting the return of that amount, the Government asserts that as these payments were erroneously included in the original purchase price, it is also entitled to a refund of the interest credited to the plaintiff under §9(b)(5)—3½ per cent on the excess of original purchase price over trade-in allowance—to the extent allocable to the erroneous inclusion. The portion of the §9(b)(5) credit is said to be $621.53.

The Government admits that the plaintiff paid the construction progress interest amounts to the Maritime Commission; that the original contract of sale between the plaintiff and the Commission specifically and unequivocally provided that these amounts were included in the purchase price of the vessels; that the Commission, charged with administering the Merchant Ship Sales Act of 1946, viewed them as a part of the purchase price; and, finally, that they were so treated in the §9(b) adjustment agreements. Nor is it contended that the Act of 1946 directs the exclusion of these payments from the computation of purchase price. Rather, the argument is premised on the view that such payments were not a part of the purchase price of the vessels under the Merchant Marine Act of 1936, 46 U. S. C. §§1101-1246 (1958 ed.), which applied to the original sale. From this it is urged that

Congress did not intend these payments to be included in the term "original purchase price" in §9 of the Act of 1946.

The argument is at best tenuous, for, as the district court pointed out, "the relevance of the text of the 1936 statute is open to question since it is the 1946 Act that is being applied." 214 F. Supp. at 596, n. 52.[7] More important, we agree with the cogent analysis of the district court which rejected the contention that these payments were improperly included as a part of the original purchase price in the adjustment under §9 of the Act of 1946. The two cases we have discovered which rule on the question have reached the same conclusion. United States v. Waterman Steamship Corp., F. 2d (C. A. 5, 1964); New York & Cuba Mail Steamship Co. v. United States, 172 F. Supp. 684 (Ct. Cls. 1959).

In sum, we are in accord with the excellent, thorough opinion of the district court with regard to each of the issues raised on these appeals.

The judgment of the district court will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

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[7] The allegedly pertinent sections of the Act of 1936 are summarized in the opinion of the district court, 214 F. Supp. at 594. A study of them makes it far from clear that construction progress interest payments were precluded from being considered as a part of purchase price even under the 1936 Act.

Judgment.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT.

Nos. 14,483 and 14,484.

NATIONAL BULK CARRIERS, INC.,
Appellant in No. 14,483,

vs.

UNITED STATES OF AMERICA,
Appellant in No. 14,484.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE.

Present: STALEY, GANEY and SMITH, Circuit Judges.

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of March 4, 1963 of the said District Court in this case be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF,
Clerk.

May 8, 1964.

Opinion.

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

Civil Action No. 2010

NATIONAL BULK CARRIERS, INC.,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

JOHN E. LEWIS, of RICHARDS, LAYTON & FINGER, Wilmington, Del., MYRON SEMMEL, New York City, and DAVID BOYD CHASE of CHASE & BIERMAN, New York City, of counsel, for plaintiff.

ALEXANDER GREENFELD, U. S. Attorney, STANLEY C. LOWICKI, Asst. U. S. Atty., Wilmington, Del., LOUIS F. OBERDORFER, Asst. Atty. Gen., Tax Division, EDWARD S. SMITH, PHILIP H. MILLER, THEODORE D. PEYSER, JR., Attys., and LAWRENCE F. LEDEBUR, Atty., Admiralty and Shipping Section, Department of Justice, Washington, D. C., of counsel, for defendant.

WRIGHT, Chief Judge.

This is a timely suit for tax refund. The question presented is the proper basis for depreciation and for the computation of gain in the sale of certain vessels purchased by the plaintiff, National Bulk Carriers, from the United States Maritime Commission. The facts are stipulated and the relevant ones may be summarized as follows:

On October 6, 1944, plaintiff purchased the seagoing tank vessels "*Phoenix*" and "*Nashbulk*" from the United States Maritime Commission, and on May 24, 1945, purchased the seagoing tank vessel "*Amtank*". These purchases were made pursuant to Section 509 of the Merchant Marine Act, 1936, c. 858, 49 Stat. 1985 (46 U. S. C. 1952 ed., Sec. 1159). To acquire the three vessels, the plaintiff was required to pay the Commission the sum of $7,707,957.12, of which $7,692,382.00 represented the cost of the vessels to the Commission less the cost of national defense features[1] and $15,575.12 represented interest on construction progress payments.[2] The sum of $1,505,000.00 was paid from an allowance for two vessels traded in and delivered to the Commission. Some amount was paid in cash and the balance was represented by mortgages on the three vessels. As of March 8, 1946, cash payments made by plaintiff totalled $896,425.01 and the balance of plaintiff's mortgage indebtedness was $5,306,550.11.

Upon delivery of the three vessels to the plaintiff, they were chartered by the Government. At various times during the charters, the Government paid charter-hire to the plaintiff. On its federal income tax returns for the years in which the charter-hire was paid, plaintiff reported the charter-hire as income and deducted depreciation for the vessels.

On March 8, 1946, Congress enacted the Merchant Ship Sales Act of 1946, c. 82, 60 Stat. 41 (50 U. S. C. Appendix 1952 ed., Sec. 1735), hereinafter referred to as "the Act." Under Section 4, citizens of the United States were given the right to purchase from the United States Maritime Commission war-built vessels at the statutory sales price defined in Section 3(d). The statutory sales price is arrived at by congressional formula ensuring a uniform sales price for each class of ships. Under Section 3(d)

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[1] Section 509 provides that the Government pay for the cost of national defense features.

[2] The interest is the subject of a Government counterclaim that is discussed in the second part of this opinion.

of the Act, the statutory sales price of the three vessels purchased by plaintiff totalled $5,153,899.31. This is the price any applicant would have paid if he bought the same type of ships after the war. Purchasers were required to pay at the time of sale at least 25% of the statutory sales price and the balance was payable in not more than twenty equal annual installments with interest at 3½% per annum. By January 15, 1951, 843 ships had been sold under Section 4 of the Act.

Section 9[3] of the Act authorizes adjustments for certain sales to citizens made prior to March 8, 1946. Plaintiff filed applications under Section 9 for an adjustment in the price of each of the three vessels purchased in 1944 and 1945. The applications were approved and an agreement for adjustment was entered into by the plaintiff and the Commission.

Pursuant to Section 9(b)(3), plaintiff was entitled to have its mortgage indebtedness reduced by $1,886,619.97 from $5,306,550.11 to $3,419,930.14. Plaintiff's trade in allowance was reduced by $1,059,505.66 from $1,505,000.00 to $445,494.34.[4]

Section 9(b) of the Act requires that certain other adjustments be made and that a net payment of cash be made by either the applicant or the Commission. There was a net credit of $1,397,283.08 in favor of the Commission.

The adjustments which gave rise to the credit of $1,397,283.08 were as follows:

(a) Section 9(b)(1) provides that, where the cash payments made before March 8, 1946, do not equal 25% of the

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[3] The full text of Section 9 appears in Appendix A of this opinion.

[4] The first three subsections have the effect of charging the applicant with the "statutory sales price" of the vessel allowing him a credit for the payments already made on account of the original purchase price and readjusting the amount of the trade-in allowance. Plaintiff admits that if the statute stopped there the adjusted purchase price would be the statutory sales price. See Plaintiff's brief, instant case, p. 11.

statutory sales price, the purchaser shall pay to the Commission the difference between the amount so paid and 25% of the statutory sales price. For the three vessels in question, plaintiff's payments did not equal the 25% figure and plaintiff therefore owed the Commission for the three vessels the sum of $392,049.82. Instead of the plaintiff making a separate payment of this amount, the Commission was given credits equal to this amount.

(b) Section 9(b)(5) provides that, for each vessel purchased, the purchaser be given a credit equal to interest at the rate of 3½% per annum on the original purchase price less any trade-in allowance from the date of delivery to March 8, 1946. By virtue of this provision, plaintiff was allowed credits totalling $234,821.77.

(c) Section 9(b)(6) provides that, for each vessel purchased, the Commission be allowed a credit equal to the charter-hire paid to the purchaser for use of the vessel prior to March 8, 1946. By virtue of this provision, the Commission was allowed credits totalling $1,385,985.30.

(d) Section 9(b)(6) also provides that, for each vessel purchased, the purchaser shall be allowed a credit equal to the amount that would have been paid as charter-hire for bareboat use of the vessel traded in for the period from the date the vessel traded in was delivered to the Commission to March 8, 1946. By virtue of this provision, plaintiff was allowed credits totalling $406,440.31 for this hypothetical charter hire.

(e) Section 9(c)(1) provides that the purchaser's federal taxes be recomputed on the following assumptions:

1. Depreciation and amortization on the vessels up to March 8, 1946, was not allowable.

2. Charter hire credited to the Commission under Section 9(b)(6) was never received by the purchaser.

3. Amounts credited to the purchaser under Sections (9(b)(5) and 9(b)(6) were income for the taxable year in which falls March 8, 1946.

Recomputation of the plaintiff's taxes under this provision resulted in deficiencies of $260,510.04. Under Section 9(b)(8), the Commission was allowed credits totalling $260,510.04.

(f) Recapitulating, the credits were as follows:

In favor of the Commission		
(a)	$ 392,049.82	
(c)	1,385,985.30	
(e)	260,510.04	$2,038,545.16
In favor of the plaintiff		
(b)	$ 234,821.77	
(d)	406,440.31	641,262.08
Net credit in favor of the Commission		$1,397,283.08

The plaintiff did not give the Commission a check for $1,397,283.08 and the Commission did not give the plaintiff the $1,886,619.97 reduction in mortgage indebtedness. Instead, plaintiff's mortgage indebtedness was reduced by $489,336.89 from $5,306,550.11 to $4,817,213.22. The reduction of $489,336.89 represents the difference between $1,886,619.97 and $1,397,283.08. Since March 8, 1946, plaintiff has paid the Commission amounts totalling $4,817,213.22 in satisfaction of its mortgage indebtedness.

In computing plaintiff's income tax for the years in question,[5] the Commissioner of Internal Revenue allowed plaintiff a deduction for depreciation on the vessels and used as a basis the statutory sales prices of the vessels adjusted for gain and loss not recognized by reason of certain statutory provisions. Plaintiff sues for tax refund on the grounds that the proper basis for depreciation is

[5] The years in issue are 1946-50, 1952, 1953, and 1955.

the original purchase price of the vessels reduced by the net adjustment in the mortgage made by reason of Section 9. In other words, the plaintiff contends that all the subsections of Section 9 must be considered in computing the price of the vessels. Determination of this narrow issue will dispose of the main part of this complicated suit. Several counterclaims have been filed by the Government; they will be treated after the basic problem is determined.

Plaintiff's Arguments.

Plaintiff's basic contention is that its depreciation figure actually represents the dollar amount invested in the ships. It notes that if Section 9 had not been passed the cost of the ships would have been $6,600,000. Under Section 9 a net credit of $489,000 was allowed; therefore the cost and necessarily the basis for depreciation is roundly $6,110,000. This figure was the amount paid to the Government.

Plaintiff relies on the plain meaning of the statute, arguing that the words are clear and unambiguous in providing that all of the items were to be used in determining the amount of the adjustment in price. Specifically alluded to are the words "the amount of such adjustment shall be determined" by and the listing of the credits and debits thereafter without an attempt to differentiate their impact. To accept the Government's position would be to disregard Sections 9(b)(4)-9(b)(8), it is concluded.

While it is argued that the statute is clear on its face, plaintiff also contends that the legislative history supports its position. Counsel rely on two subsequent declarations of intent which were appended to House [6] and Senate [7] reports recommending an amendment to Section 9 that encompassed the taxpayer's position. Each of these declarations stated that it had been Congress' intent that all of the subsections were to be considered in reaching a depreciation figure.

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[6] H. R. Rep. No. 1342, 81st Cong., 1st Sess. (1950).

[7] S. Rep. No. 1915, 81st Cong., 2d Sess. (1950).

Finally, it is argued that the fallaciousness of the Government's position is amply borne out by the five cases[8] that previously rejected the contentions of the United States, as well as the Commission's acceptance of plaintiff's position.[9] Attention is drawn to the statement by one district judge who said "that the Internal Revenue Service is attempting to create confusion in an area where Congress has been most explicit in setting forth the statutory procedure."[10]

DEFENDANT'S ARGUMENTS.

The United States asserts that the Act as a whole was passed to ensure uniform sales prices for ships of the same class. Congress thought price uniformity would be conducive to the orderly disposition of the war-time fleet consistent with maintaining the economic standards of the Merchant Marine. With this background, the Internal Revenue Service argues that a literal reading of Section 9 and its legislative history conclusively demonstrate that Congress intended the pre-war contract prices to be reduced to the statutory sales price. This is accomplished by Sections 9(b)(1)-9(b)(3). The Government concludes that

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[8] Waterman Steamship Corp. *v.* United States, 62-1, U.S. T. C. 9379 (D. Ala. 1962); Socony Mobil Oil Co. *v.* United States, 287 F. 2d 910 (Ct. Cls. 1961) (one opinion covered all 3 Ct. of Cls. cases); Texaco, Inc. *v.* United States, 287 F. 2d 910 (Ct. Cls. 1961); Mississippi Shipping Co. *v.* United States, 287 F. 2d (Ct. Cls. 1961); Barber Oil Corp. *v.* Manning, 135 F. Supp. 451 (D. N. J. 1955).

[9] A letter from the Maritime Commission to the plaintiff stated:

> "On August 6, 1951, the Deputy Maritime Administrator approved your application for an *adjustment*, under the Merchant Ship Sales Act of 1946, *in the prices of the vessels* * * *. If the *adjustment* as so approved is acceptable to you in full settlement of all claims by you or on your behalf *in respect of the purchase prices of the above vessels*, please countersign * * *." (Italics supplied.)

[10] Waterman Steamship Corp. *v.* United States, note 8 supra, at p. 84,062.

Congress' intent in passing the other subsections was to eliminate the benefits and detriments of pre-enactment ownership. And, that the legislative body never intended to treat all of the debits and credits as payment for the vessels in question.

The United States also asserts that the taxpayer's interpretation of Section 9 leads to a double tax benefit with reference to the charter hire. It reasons this way. The first benefit arises from the refund of the income tax on the charter hire. Capitalizing the charter hire for purposes of depreciation would be the second benefit. Since double tax benefits are frowned upon,[11] the Government argues that its interpretation is compelled.[12]

Law and Decision.

It is undisputed that cost is the basis for depreciation under the Internal Revenue Code. The problem raised by the case at hand involves the effect of the intent of Congress as expressed by a statute passed to deal with a specific problem on the ordinary rules of depreciation formulated under the Internal Revenue Act. Before Solution is attempted, it seems appropriate to note the court's role when faced with problems of statutory construction.

The fundamental goal of judicial construction is the application of the law in the spirit of the basic policy which motivated the Congress to act. To attain this objective, certain principles of construction have been developed by the Supreme Court and the lower federal

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[11] The Bureau relies on Detroit Edison Co. v. Commissioner, 319 U. S. 98 (1943).

[12] Other arguments made by the Government include (1) that a return of a charter hire is like the return by a Government contractor under the federal renegotiation statutes, (2) the return of charter hire was not a payment by the taxpayer because the funds were not derived from the taxpayer's capital but from the Government's, (3) if the return of charter hire is includible in cost then its prior receipt would be considered an offset to cost, and (4) if the return of charter hire were included in depreciation basis, there would be absurd results.

courts. Where the statute is plain and unambiguous a court may not refer to the legislative history of a bill.[13] But, when a statute is ambiguous courts need not limit their search to sources embodied in the Act.[14] Extrinsic aids such as reports of committees, statements made at hearings or during the course of floor debate and similar material may be used to glean the legislature's intent.[15]

Section 9 is sufficiently unclear to justify resort to legislative history. This is not to say that the plaintiff's basic argument—the statute cannot be read literally to differentiate the legal impact of some subsections from the others—does not have merit. It does to the extent Congress did not specifically state in headings that 9(b)(1)-9(b)(3) shall effect the change in price and the other subsections are to eliminate the benefits and detriments of pre-enactment ownership and are irrelevant to cost. There is room to read Section 9 as one indivisible formula. However, there is ample, if not overwhelming, support for the position of the United States in the language of the statute.

Subsection (b) states that "[S]uch adjustment shall be made * * * by treating the vessel as if it were being sold to the applicant on the date of the enactment of the Act, and not before that time." If the ships were sold on the date of enactment their cost would have been the statutory sales price. The latter would necessarily have been the basis for depreciation. This language introduces and is the framework of the adjustment provisions. It forcibly suggests that Congress intended all ships of the same class

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[13] See e.g., Ex parte Collett, 337 U. S. 55 (1949); United States v. Rice, 327 U. S. 742 (1946). See generally, Frank, Words and Music: Some Remarks on Statutory Interpretation, 47 Colum. L. Rev. 1259 (1947).

[14] E.g., ICC v. Parker, 326 U. S. 60 (1945); NLRB v. Hearst, Inc., 322 U. S. 111 (1944); Cohen, The Value of Value Symbols in the Law, 52 Colum. L. Rev. 893 (1952).

[15] For a full discussion of the importance of each type of extrinsic aid, see 2 Sutherland, Statutory Construction, §§5001-5016 (Horack ed. 1943).

to be depreciated on the same basis without reference to date of purchase.

It is agreed by the parties that the application of Sections 9(b)(1)-9(b)(3) would reduce the original contract price to the statutory sales price. The problem arises from the fact that Congress did not stop there; it provided for further adjustment. While the legislature has not interlined any distinguishing language between those sections that bring the contract price down to the statutory sales price and the other sections, a close reading suggests that the legislature may have had some distinction in mind. Section 9(b)(3) involves the situation where the purchaser only makes part payment and owes the balance. It says apply certain adjustments to the mortgage, the net effect of which is to charge the applicant with the statutory sales price. The section says the amount of "the adjusted mortgage indebtedness shall be * * *." This is somewhat different from 9(b)(5) and 9(b)(6) which start out "[T]he Commission shall credit * * *." These sections look to the immediate exchange of cash after all the credits and debits have been added; Congress has so provided. The two different modes of adjustment suggest that Congress contemplated two severable transactions.[16] If the legislature intended that all the adjustments be considered part of cost, it would have been logical to provide that all adjustments be applied first to the mortgage indebtedness.[17]

In support of the Government's position, several other arguments may be drawn from the text of the statute. The theory that Congress provided one indivisible formula is inconsistent with the fact that there are several different modes of adjustment. Under Section 9(c)(2) the Govern-

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[16] Section 9(b)(4) applies when the applicant has paid in cash more than the statutory sales price. Then, unlike 9(b)(3), the adjustment is made by means of a credit. However, this would not seem to subvert the above argument because here Congress has no practical, alternative means of adjustment.

[17] It should be noted that the Commission, in this case, actually applied all the adjustments against the mortgage. This is conceded to be erroneous and contrary to the statute.

ment's liability for the loss of a vessel adjusted under Section 9 and chartered to the Government is limited to the statutory sales price depreciated to the date of loss. If the new price is not the statutory sales price, this provision is without meaning. Finally, it should be noted that the caption of the section does not include the phrase "price adjustment" as reported in U. S. C. In the official statute the broader phrase "adjustment for prior sales to citizens" is used.[18]

The presence of logical arguments supporting two interpretations of the same language compel the conclusion that the statute is ambiguous. Guidance must be sought in the legislative history of the Act, if construction of the statute is to be consistent with the legislative intent.

At the outset, it is important to take a broad view of the Act as a whole. During World War II the United States had accumulated a vast fleet of cargo carriers and at War's end it became necessary to dispose of these ships.[19] The legislature's objectives were twofold: to dispose of the fleet in an orderly fashion and at the same time maintain a vigorous and healthy Merchant Marine.[20] Ruinous competition was feared. Congress sought to obtain its basic goals through the implementation of a firm pricing policy for the sale of war-built vessels and the establishment of an inactive merchant vessel reserve promptly available for security needs, but frozen so far as commercial use is concerned.[21]

After studying the legislative history of Section 9, one inescapable conclusion concerning legislative intent appears. Congress meant to put pre-Act and post-war purchasers on exactly the same basis—their shoes were to

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[18] See 60 Stat. 46.

[19] See S. Rep. No. 807, 79th Cong., 1st Sess., 1-2 (1945); H. R. Rep. No. 831, 79th Cong., 1st Sess., pp. 1-2 (1945). See also American President Lines v. United States, 162 F. Supp. 732 (D. Del. 1958).

[20] Ibid.

[21] See S. Rep. No. 807, 79th Cong., 1st Sess., p. 1 (1945).

be interchangeable. Using this fact as a major premise it becomes clear that all buyers were to pay one price, the statutory sales price. This conclusion is supported directly as well as inferentially by the legislative history. It is entirely consistent with the Act's general goals which encompass a firm pricing policy.[22]

Section 9, as enacted, can be traced to a floor amendment offered by Representative Jackson, chairman of the subcommittee in charge of amendments to the bill.[23] The day before it was offered the purpose of the amendment was explained. Mr. Jackson said:

> "Section 9 of HR 3603 provides for a refund to operators who purchased vessels during the war, at war cost, back to the statutory sales price contained in section 3 of the Act. Such an adjustment is fair. We do not want to place the wartime purchaser at a disadvantage with his competitor who acquires a similar vessel under the provisions of this bill.
>
> "However, section 9 contains many loopholes which in my opinion places the wartime purchaser in a far better position than future purchasers. For one thing, the wartime purchaser, under section 9, would be allowed trade-in allowances far in excess of those provided under the committee amendment to section 8.
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> "If there is to be equality between the past and future purchasers there must be comparable terms and nothing less. * * * I have proposed certain modifications to section 9 of HR 3603 which has been accepted as a committee amendment. *The effect*

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[22] If the general goal of the Act involves firm prices, to allow purchasers of the same type of vessel to have different basis for depreciation would be to subvert the basic objective.

[23] See 91 Cong. Rec. 9182 (1946). While the use of floor debates to determine legislative intent is not looked on with favor, an exception is made for the chairman in charge of the bill. His statements are in the nature of supplemental committee reports and are entitled to the same weight. See 2 Sutherland, op. cit., at §§5011-12.

of this amendment is to treat prior sales as having taken place on the date of the enactment of this bill. The operator is compensated for all actual money investment to date by an allowance of 3½% interest thereon.'"[24] (Emphasis supplied.)

No clearer statement in support of the Government's position could be made. Yet, sole reliance need not be placed on it. The same theme runs throughout the House debates.[25]

The House[26] and Senate[27] reports which were made before the proffer of the amendment, and the subsequent conference report[28] are entirely consistent with and in support of the main thesis of the House debates. They demonstrate that the Congress intended to reduce the original contract price to the statutory sales price and to eliminate the benefits and detriments of pre-enactment ownership with other adjustments.

The Senate emphasized the need for a firm pricing policy. The report stated: "[U]nless adjustments were made in connection with these prior sales to conform to the selling price prescribed in the bill, there would be strong likelihood

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[24] See 91 Cong. Rec. 9182-9185 (1946).

[25] E.g., at page 9282, Mr. Jackson stated: "The committee amendment treats all of these prior sales as being made on the date of the bill's enactment and not before that time, so that the previous purchaser and a future purchaser will be put on exactly the same basis. In order to accomplish this result it is necessary to unwind a previous transaction, and most of the provisions which appear complicated are the provisions describing how this unwinding is done."

At page 9284, Mr. Bradley stated: "The purpose of the amendment is to put everybody on the same basis as of the date of the enactment of the legislation." See generally 9281-9284. There is some contrary authority. Mr. Buck denominated the amendment as "a shot in the dark" and opposed on the grounds that adoption of the amendment would be acting without knowledge.

[26] H. Rep. No. 831, 79th Cong. (1945).

[27] S. Rep. No. 807, 79th Cong., 1st Sess. (1945).

[28] H. Conference Rep. No. 1526, 79th Cong., 2d Sess. (1945).

of breaking down or attempts to break down the firm pricing policy on the ground that the failure to make such adjustment would be unwarranted discrimination against earlier purchasers."[29]

The Senate adjustment equaled the excess of the original purchase price (depreciated at a certain rate) over the statutory sales price as of the date of enactment.[30] Conditions on the adjustment rather than parts of the whole, included return of a portion of the charter hire.

The House report also emphasized the need for a firm pricing policy and stated with clarity the effect of its version of Section 9 which was eventually amended. It said: "the effect of making the adjustment is the same as if the bill had been enacted at the beginning of the war period and *all sales during the war period had been at the statutory sales price.*"[31] Conditions for receiving the adjustment involved treating the sale for all purposes as if it were made under the bill; thus, for example, a portion of the charter hire had to be returned. The logical conclusion to be drawn from both the House and Senate reports is that at all times, the Congress had only one idea in mind—to treat the Section 9 applicants as if they purchased on the date the Act was passed.

The basic difference between the House bill and the final Senate version are set forth in the conference report. To be noted, however, is the recognition in the report that both versions provided for "(1) adjustment of the original purchase price, (2) adjustment of the charter hire, (3) adjustment of trade-in allowance in connection with the prior original purchase, and (4) adjustments of taxes paid on account of ownership in the vessel."[32] Neither House had urged one indivisible formula of adjustment; both Houses

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[29] S. Rep. at p. 19.

[30] Ibid.

[31] H. Rep. at p. 12.

[32] H. Conference Rep. at p. 17.

treated the adjustment in purchase price as one complete and severable transaction.[33]

In the face of this clear and persuasive legislative history, plaintiff argues that the Congressional intent, as evidenced by subsequent reports of the 81st Congress,[34] supports its position. There can be no doubt that these reports unequivocally state that it had been the intent of the 79th Congress to include all adjustments in the depreciation base. However, these statements are entitled to little or no weight. In *Fogarty* v. *United States*,[35] the Supreme Court said that "[I]f there is anything in these subsequent events at odds with our finding of the meaning of Section 3, it would not supplant the contemporaneous intent of the Congress which enacted the Lucas Act." This principle is dispositive of the plaintiff's contention.[36]

Because of the strength of the legislative history and the support found in the language of Section 9, this court, in a case of first impression, would unhesitatingly rule for the Government. However, three lower federal courts have reached the opposite result,[37] and it is thus contended that principles of stare decisis and uniformity justify decision for the plaintiff. This argument must be rejected. All three cases were decided by different courts of co-ordinate level. The two district courts did not deal with the problem in

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[33] The House bill was explained on the same basis as always i.e., it treats all purchasers as if they bought on the day of enactment—and the conference agreement restored the House provisions. H. Conf. Rep. at p. 17.

[34] S. Rep. No. 1915, 81st Cong., 2d Sess. (1950); H. R. Rep. No. 7342, 81st Cong., 1st Sess. (1950).

[35] 340 U. S. 8 (1950).

[36] This court is cognizant of the rule of the Sioux Indian case —i.e., a subsequent expression of opinion as to the meaning of a statute by the same committee which had considered that statute is an important circumstance in interpreting the statute. Sioux Tribe v. United States, 316 U. S. 317 (1942). However, Fogarty was decided after the Sioux Tribe case and therefore the former must be followed.

[37] See cases note 8, supra.

extenso and decided the cases on different grounds from the ones set out in this opinion.[38] The Court of Claims did go into the legislative history, but the Court respectfully differs on the conclusions to be drawn concerning the intent of the legislature.[39] It is for the Supreme Court or Congress to conclusively determine this problem.

A decision for the taxpayer would be contrary to the equitable principles that motivated the Congress to act. A larger depreciation basis for war-time buyers of the same class of ships would give them a substantial competitive advantage over similar situated, post-war buyers.[40] With the language and the background of the legislation in mind, the Government must prevail.

The Government Counterclaims.

The sole issue remaining before the court is whether the term "original purchase price" as used in Section 9 of the Act includes interest paid by the taxpayer to the Government on construction progress payments which the United States paid to shipbuilders in the taxpayer's behalf.[41] If the statutory term does not include the interest the Government should prevail in its counterclaim to recover allegedly erroneous credits granted under Section 9

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[38] The basic reasoning in Barber Oil was that the refund of charter hire was "not actually paid to the Commission by the palintiff and it would be mathematically erroneous to subtract it from plaintiff's payments." 135 F. Supp. at 460. In Waterman, the court reasoned that the "economic cost" must be the taxpayer's basis under the code. See 62-1 U. S. T. C. at 84,062-63.

[39] The Court of Claims noted that if the Senate bill had passed, the Government's position would be correct. But, since the House bill was enacted the Government's view had to be rejected. See 287 F. 2d at 913-14.

[40] It should be noted that under 9(b)(5) pre-Act purchasers are fully compensated for their war-time investment. This was the keystone to putting all buyers on exactly the same basis.

[41] The United States also filed a counterclaim which was contingent on its losing the main suit.

by the Maritime Commission. The facts are stipulated and their detailed exposition is necessary to an understanding of the posed issue.

Section 509[42] of the Merchant Marine Act of 1936[43] allows any citizen to make application to Maritime for aid in the construction of a new vessel. The section specifies certain conditions applicable to all approved applications, namely:

> (1) The Commission shall pay for the cost of national defense features;
>
> (2) depending on the ship's specifications, the applicant must pay from 12½-25 percent of the cost of the vessel (excluding national defense features);
>
> (3) the balance of the purchase price is to be paid in 25 years with interest at the rate of 3½ percent secured by a preferred mortgage in favor of the government.

In Section 502(c)[44] of the 1936 Act Congress listed further conditions applicable to all approved transactions. They were

> (1) the cash payment (order under §509) had to be made at the time and in the same proportion as provided for the payment on account of construction cost in the contract between the shipbuilder and the Commission,
>
> (2) the applicant, had to pay, not less frequently than annually, interest at the rate of 3½ percent on those portions of the Commission's payments as made to the shipbuilder which were chargeable to the applicant's purchase price (after deduction of the applicant's payments), and

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[42] 46 U. S. C. 1159 (1958).

[43] 46 U. S. C. 1101-1294 (1958).

[44] 46 U. S. C. 1152 (1958).

(3) the balance of the purchase price had to be paid in 25 years and 3½ percent interest was due the Government on the unpaid balance.[45]

The Government counterclaim involves the S.S. *Phoenix* and the S.S. *Nashbulk* both of which were bought under Section 509.[46] The cost of constructing the *Phoenix* exclusive of national defense features was $2,510,000 and the statutory interest chargeable under 502(c) to the taxpayer was $4,285.84. Exclusive of national defense features the *Nashbulk* cost $2,581,600 and the interest on progress payments was $11,289.28.[47]

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[45] A hypothetical fact situation can be used to demonstrate the operations of these sections of the 1936 Act. Assume A, a shipper, applies to Maritime for aid in construction of a tanker and it is approved. The Commission then goes out and contracts with a shipbuilder for the construction of the vessel. The ship's cost is $800,000 and the cost of national defense features is $200,000. Maritime pursuant to the agreement makes four progress payments of $250,000. Assume A has an obligation to make a 25 percent cash or down payment. He then would have to pay $200,000 in four payments of $50,000 each. Necessarily, that means the Government has paid in progress payments $600,000 which is applicable to purchase price. Under Section 502(c) A would owe 3½ percent interest per annum on that $600,000. However, when the ship is delivered A would take a 25 year mortgage and pay 3½ percent per annum on the balance of the purchase price. Thus, the Section 502(c) obligation to pay interest on progress payment only lasts as long as it takes to build and deliver the vessel.

[46] National Bulk Carrier's suit also involves a third vessel—SS. *Amtank*—which is not involved here.

[47] Thus, the total "cost" of each vessel may be derived as follows:

SS. *Phoenix:*	Contract Price	$2,510,000.00	
	Interest	4,285.84	
		$2,514,285.84	
SS. *Nashbulk:*	Contract Price	$2,581,600.00	
	Interest	11,289.28	
		$2,592,289.28	$5,107,175.12

Plaintiff provided for payment in this way:

Cash payments	$ 410,000.00	
Trade-in Allowance	710,000.00	
Mortgage Indebtedness	3,987,175.12	$5,107,175.12

The original purchase contracts between Maritime and National Bulk Carriers treated the interest on progress payments as part of the purchase price.[48] With the passage of the Merchant Ship Sales Act of 1946 the taxpayer applied for and received a Section 9 adjustment. In the adjustment agreement, the interest was included in the original purchase price.[49] Through the operation of 9(b)(1)-9(b)(3) the inclusion of the interest in the original purchase price allows the taxpayer to recover that amount through credits.[50] Also, under 9(b)(5) the applicant receives interest on the interest it paid on progress payments.[51] The Government seeks to recover the $15,575.12 of interest and $621.53 which represents alleged illicit interest on interest.

GOVERNMENT CONTENTIONS.

While admitting that the original contract as well as the adjustment agreements treats the interest as part of the original purchase price, the Government asserts that it nevertheless is not barred from recovery. It is argued that original purchase price is defined and controlled by statute. To the extent the agreements are in conflict with statute, the latter must prevail. This conclusion follows, it is argued, from the well known principle that the Government is not bound by unauthorized acts of its agents.

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[48] The contracts stated as follows: "ARTICLE 3. *Purchase Price of New Vessels.* The Buyer agrees to pay at the times and in the manner hereinafter set forth as purchase price of the New Vessels the full cost thereof to the Commission, including outfitting and equipping the New Vessels, exclusive of the cost of national defense features, upon completion and delivery in accordance with said Construction Contracts, and including interest at the rate of 3½ per centum per annum on payments made by the Commission on account of the cost of construction * * *."

[49] The various credits and countercredits are set forth in the first part of the opinion.

[50] Under those sections the original purchase price is reduced to the statutory sales price. Thus, the higher the purchase price the greater the credit. See *supra*.

[51] This section is designed to compensate the buyer for his pre-Act investment. See *supra*.

Turning to statutory authority, the Government cites the texts of Sections 502(c) and 509 as clearly demonstrating that original purchase price was exclusive of interest on progress payments. Essentially, it is argued that original purchase price is cost to the Government and not to the owner. And, that the interest is merely payment for the "use of Government money" and not part of purchase price.

Taxpayer Arguments.

The basic argument of the taxpayer is that the contract of purchase is clear and unambiguous in stating that the purchase price included the interest payments. It contends that a particular item of price does not cease to be part of the whole because it is measured by reference to some other item. National Bulk Carriers cites the Waterman case as holding precisely contrary to the Government position and thereby concludes that the counterclaim is demonstrated to be without merit. Finally, the taxpayer assumes arguendo that the credits were erroneous, but asserts that recovery still cannot be had because the adjustment contract drawn under Section 9 of the 1946 Act was in full settlement of all claims and bound both parties thereto.

Law and Decision.

In 9(b)(1), 9(b)(4), and 9(b)(5) Congress used the phrase "original purchase price." No more language appears in explanation of the concept. The phrase must be given the meaning that best advances and is most consistent with the basic policy of the Act of 1946.[52] To do this all evidence relevant to the intent of Congress must be examined.

It would seem that Congress could have intended "original purchase price" to encompass either of two valuations: the contract price between Maritime and the shipbuilder

[52] The Government's main arguments revolve around the text of the 1936 Act. The relevance of the text of the 1936 statute is open to question since it is the 1946 Act that is being applied.

exclusive of national defense features; or the total cost to the buyer to gain possession of the vessel. There is nothing intrinsic in the phrase that compels one or the other conclusion. Necessarily, the legislative history of the bill must be scrutinized.

In the House and Senate reports there is no specific reference to the meaning of "original purchase price." The legislative history does indicate a clear intent on the part of the Congress to unwind the previous transaction—to put all buyers of the same type vessel on equal footing. Using that principle as a major premise, it is clear that the Government must fail on its counterclaim.

A post-war purchaser buys a ship at the statutory sales price. Usually, he will make payment with cash, trade-in and a 3½ percent mortgage. By the operation of Section 9 a pre-Act buyer also pays the statutory sales price and will provide for payment in the same manner as the post-war buyer. However, he may be saddled with the additional burden of paying interest on progress payments. Moreover, this interest is based on a much higher total price than the statutory sales price. A post-Act buyer would not be faced with the burden of paying interest on progress payments; under Section 3 of the 1946 Act he receives a war-built vessel. Thus, the logical corollary of Congress' intent to put all purchasers on the same basis would be the complete return of interest on progress payments. The necessary effect of 9(b)(1)-9(b)(3) is to do just this. An interest deduction would not suffice. By interpreting "original purchase price" to be the total cost to the buyer—contract price plus interest—the basic intent of Congress is furthered. Neither the post-war nor pre-Act buyer has any competitive advantage. They both pay the same price for the ship, the statutory sales price.

The correctness of this result is buttressed by two cases which also reject the Government position[53] as well as the

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[53] New York & Cuba Steamship Co. *v.* United States, 172 F. Supp. 684 (Ct. of Cls. 1959); Waterman Steamship Corp *v.* United States, *supra:*

Maritime Commission's own interpretation of the Act.[54] The latter is entitled to great weight as Maritime is the Commission charged with the administration and enforcement of the statute.[55]

The Government's final contention is that plaintiff should not be allowed to recover "interest on interest" under 9(b)(5). This contention does not accord with Congress' intent to put all buyers on the same basis. Since interest on progress payments is included in "original purchase price" the buyer pays interest on it as part of his mortgage obligation. This fact is equitably counterbalanced by the 9(b)(5) provision.[56]

Judgment is granted for the United States on the main claim, and for the plaintiff on the Government's counterclaim.

Submit order.

At Wilmington,
February 5, 1963.

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[54] The contract of purchase as well as the adjustment agreement between plaintiff and Maritime treat interest on progress payments as part of "original purchase price." See *supra*.

[55] For cases so holding see e.g. NLRB *v.* Hearst, 322 U. S. 111 (1944); Hammon *v.* Hull, 131 F. 2d 23 (1942); Brennan *v.* Stark, 185 F. 2d 871 (1950).

This argument does not apply with the same force to the main claim. There, there was no problems of interpretation for the Commission. It merely applied Section 9 and was not faced with the depreciation basis issue. The interpretation of "original purchase price" was something the Commission had to do in order to give the plaintiff the proper credit. Also, the evidence of the Commission's position on the depreciation issue is not overly persuasive. See note 9, *supra*. At any rate, the Maritime interpretation is entitled to great weight but is not conclusive.

[56] See Waterman *v.* United States, note 8 *supra*, at 84,065, holding that interest on progress payments is part of original purchase price for 9(b)(5) purposes.

APPENDIX A [to opinion]

§1742. Price adjustment on prior sales to citizens—(a) Form, manner, and time of application

A citizen of the United States who on the date of the enactment of this Act [March 8, 1946]—

(1) owns a vessel which he purchased from the Commission prior to such date, and which was delivered by its builder after December 31, 1940; or

(2) is party to a contract with the Commission to purchase from the Commission a vessel, which has not yet been delivered to him; or

(3) owns a vessel on account of which a construction-differential subsidy was paid, or agreed to be paid, by the Commission under section 504 of the Merchant Marine Act, 1936, as amended [section 1154 of Title 46], and which was delivered by its builder after December 31, 1940; or

(4) is party to a contract with a shipbuilder for the construction for him of a vessel, which has not yet been delivered to him, and on account of which a construction-differential subsidy was agreed, prior to such date, to be paid by the Commission under section 504 of the Merchant Marine Act, 1936, an amended [section 1154 of Title 46]; shall, except as hereinafter provided, be entitled to an adjudgment in the price of such vessel under this section if he makes application therefor, in such form and manner as the Commission may prescribe, within sixty days after the date of publication of the applicable prewar domestic costs in the Federal Register under section 3(c) of this Act [section 1736(c) of this Appendix]. No adjustment shall be made under this section in respect of any vessel the contract for the construction of which was made after September 2, 1945, under the provisions of title V [sections 1151-1161 of Title 46] (including section 504 [section 1154 of Title 46]) or title VII of the Merchant Marine Act, 1936, as amended [sections 1191-1204 of Title 46].

(b) Such adjustment shall be made, as hereinafter provided, by treating the vessel as if it were being sold to the applicant on the date of the enactment of this Act [March 8, 1946], and not before that time. The amount of such adjustment shall be determined as follows:

(1) The Commission shall credit the applicant with the excess of the cash payments made upon the original purchase price of the vessel over 25 per centum of the statutory sales price of the vessel as of such date of enactment [March 8, 1946]. If such payment was less than 25 per centum of the statutory sales price of the vessel, the applicant shall pay the difference to the Commission.

(2) The applicant's indebtedness under any mortgage to the United States with respect to the vessel shall be adjusted.

(3) The adjusted mortgage indebtedness shall be in an amount equal to the excess of the statutory sales price of the vessel as of the date of the enactment of this Act [March 8, 1946] over the sum of the cash payment retained by the United States under paragraph (1) [of this subsection] plus the readjusted trade-in allowance (determined under paragraph (7) [of this subsection]), with respect to any vessel exchanged by the applicant on the original purchase. The adjusted mortgage indebtedness shall be payable in equal annual installments thereafter during the remaining life of such mortgage with interest on the portion of the statutory sales price remaining unpaid at the rate of 3½ per centum per annum.

(4) The Commission shall credit the applicant with the excess, if any, of the sum of the cash payments made by the applicant upon the original purchase price of the vessel plus the readjusted trade-in allowance (determined under paragraph (7) [of this subsection]) over the statutory sales price of the vessel as of the date of the enactment of this Act [March 8, 1946] to the extent not credited under paragraph (1) [of this subsection].

(5) The Commission shall also credit the applicant with an amount equal to interest at the rate of 3½ per centum per annum (for the period beginning with the date of the original delivery of the vessel to the applicant and ending with the date of the enactment of this Act [March 8, 1946]) on the excess of the original purchase price of the vessel over the amount of any allowance allowed by the Commission on the exchange of any vessel on such purchase; the amount of such credit first being reduced by any interest on the original mortgage indebtedness accrued up to such date of enactment and unpaid. Interest so accrued and unpaid shall be canceled.

(6) The applicant shall credit the Commission with all amounts paid by the United States to him as charter hire for use of the vessel (exclusive of service, if any, required under the terms of the charter) under any charter party made prior to the date of the enactment of this Act [March 8, 1946], and any charter hire for such use accrued up to such date of enactment and unpaid shall be canceled; and the Commission shall credit the applicant with the amount that would have been paid by the United States to the applicant as charter hire for bare-boat use of vessels exchanged by the applicant on the original purchase (for the period beginning with date on which the vessels so exchanged were delivered to the Commission and ending with the date of the enactment of this Act [March 8, 1946]).

(7) The allowance made to the applicant on any vessel exchanged by him on the original purchase shall be readjusted so as to limit such allowance to the amount provided for under section 8 [section 1741 of this Appendix].

(8) There shall be subtracted from the sum of the credits in favor of the Commission under the foregoing provisions of this subsection the amount of any overpayments of Federal taxes by the applicant resulting from the application of subsection (e)(1) [of this section], and there shall be subtracted from the sum of the credits in favor of the applicant under the foregoing provisions of this sub-

section the amount of any deficiencies in Federal taxes of the applicant resulting from the application of subsection (c)(1) [of this section]. If, after making such subtractions, the sum of the credits in favor of the applicant exceeds the sum of the credits in favor of the Commission, such excess shall be paid by the Commission to the applicant. If, after making such subtractions, the sum of the credits in favor of the Commission exceeds the sum of the credits in favor of the applicant, such excess shall be paid by the applicant to the Commission. Upon such payment by the Commission or the applicant, such overpayments shall be treated as having been refunded and such deficiencies as having been paid. For the purposes of this subsection, the purchase price of a vessel on account of which a construction-differential subsidy was paid or agreed to be paid under section 504 of the Merchant Marine Act, 1936, as amended [section 1154 of Title 46], shall be the net cost of the vessel to the owner.

CONDITIONS BINDING ON APPLICANT

(c) An adjustment shall be made under this section only if the applicant enters into an agreement with the Commission binding upon the citizen applicant and any affiliated interest to the effect that—

(1) depreciation and amortization allowed or allowable with respect to the vessel up to the date of the enactment of this Act [March 8, 1946] for Federal tax purposes shall be treated as not having been allowable; amounts credited to the Commission under subsection (b)(6) [of this section] shall be treated for Federal tax purposes as not having been received or accrued as income; amounts credited to the applicant under subsection (b)(5) and (6) [of this section] shall be treated for Federal tax purposes as having been received and accrued as income in the taxable year in which falls the date of the enactment of this Act [March 8, 1946];

(2) the liability of the United States for use (exclusive of service, if any, required under the terms of the charter)

of the vessel on or after the date of the enactment of this Act [March 8, 1946] under any charter party shall not exceed 15 per centum per annum of the statutory sales price of the vessel as of such date of enactment [March 8, 1946]; and the liability of the United States under any such charter party for loss of the vessel shall be determined on the basis of the statutory sales price as of the date of the enactment of this Act [March 8, 1946], depreciated to the date of loss at the rate of 5 per centum per annum; and

(3) in the event the United States, prior to the termination of the existing national emergency declared by the President on May 27, 1941, uses such vessel pursuant to a taking, or pursuant to a bare-boat charter made, on or after the date of the enactment of this Act [March 8, 1946], the compensation to be paid to the purchaser, his receivers, and trustees, shall in no event be greater than 15 per centum per annum of the statutory sales price as of such date.

APPLICABILITY OF OTHER LAWS

(d) Section 506 of the Merchant Marine Act, 1936, as amended [section 1156 of Title 46], shall not apply with respect to (1) any vessel which is eligible for an adjustment under this section, or (2) any vessel described in clauses (1)-(3), or (4) of subsection (a) of this section, the contract for the construction of which is made after September 2, 1945 and prior to the date of enactment of this Act [March 8, 1946]. Mar. 8, 1946, c. 82, §9, 60 Stat. 46.

Opinion.

IN THE

UNITED STATES COURT OF APPEALS,

FOR THE FIFTH CIRCUIT.

No. 20040

UNITED STATES OF AMERICA,

Appellant,

versus

WATERMAN STEAMSHIP CORPORATION,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA.

(March 30, 1964.)

Before RIVES, CAMERON and HAYS,* Circuit Judges.

RIVES, Circuit Judge: This suit for refund of income taxes for the years 1947 through 1950 was tried by the district court without a jury. Pursuant to a carefully considered opinion reported as *Waterman Steamship Corporation* v. *United States*, 203 F. Supp. 915, the court entered judgment for the taxpayer Waterman in the total amount of $2,241,388.30, together with interest. On appeal there is no complaint as to the rulings on the three issues which the district court captioned: "I. WATERMAN BUILDING" (203 F. Supp. 917-921), "II. BABY FLAT-TOPS" (Id. 921-925), and "IV. ALABAMA STATE TAX" (Id. 926-928). The remaining questions are: (1) whether Waterman is entitled to a foreign tax credit under

* Of the Second Circuit, sitting by designation.

section 131 of the Internal Revenue Code of 1939 for certain taxes paid to the Republic of the Philippines;[1] (2) whether the district court correctly determined Waterman's cost basis for depreciation of eighteen vessels whose sales prices were adjusted pursuant to the Merchant Ship Sales Act of 1946;[2] (3) whether the district court correctly held that interest paid by Waterman on Government-advanced progress payments was properly included in "the original purchase price" of eighteen vessels for purposes of the price adjustment authorized by section 9 of the Merchant Ship Sales Act of 1946.

* * * * * *

For the purpose of the depreciation issue the facts were also stipulated, and are fairly stated by the district court in 203 F. Supp. at 928. The difference between the amounts contended for as the proper cost basis of the vessels for depreciation is $8,818,838.55.

The district court decided this issue in favor of the plaintiff taxpayer in line with earlier decisions in *Barber Oil Corporation* v. *Manning*, D. C. N. J. 1955, 135 F. Supp. 451, 458-461, and *Socony Mobil Oil Co.* v. *United States*, *Texaco, Inc.* v. *United States*, *Mississippi Shipping Co.* v. *United States*, Ct. Cl. 1961, 287 F. 2d 910. Later the District Court for the District of Delaware, in an extensive opinion, declined to agree with any of the earlier decisions and decided the issue in favor of the United States. *National Bulk Carriers, Inc.* v. *United States*, D. C. Dela. 1963, 214 F. Supp. 585.[3]

After careful study, we are constrained to agree with the District of Delaware, and set forth briefly the reasons which lead us to that decision. The language of the statute and its legislative history show that Congress intended pre-enactment purchases to be treated as if the sale had

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[1] 14 Philippine Annotated Laws, Title 72.

[2] Chapter 82, 60 Stat. 41 (50 U. S. C. A. Appendix, 1952 ed., sec. 1735).

[3] Attached as Appendix A to that opinion at 214 F. Supp. 597-599 is the full text of the pertinent Section 9 of the Merchant Ship Sales Act of 1946.

occurred on the date of enactment, that is, on a parity with post-enactment purchases. That is explicitly stated in the opening paragraph of section 9(b):

> "(b) Such adjustment shall be made as hereinafter provided, by treating the vessel as if it were being sold to the applicant on the date of the enactment of this Act, and not before that time. The amount of such adjustment shall be determined as follows: . . ."

Of the subparagraphs which follow, some provide for a decrease in the cash down payment and mortgage indebtedness [sections 9(b)(1), (2), (3) and (4)] which would adjust the purchase price to conform to the statutory sales price provided by section 3(d)(4). Other subparagraphs provide for adjustments which compensate the purchaser for his investment [section 9(b)(5)], restore charter hire paid or that should have been paid [section 9(b)(6)], and return taxes and tax benefits due to pre-enactment ownership [sections 9(b)(8) and 9(c)(1)]. Those items, which are not capital in nature, do not enter into the computation of cost for purposes of depreciation.

The legislative history of section 9 is set forth at some length in the opinion of the Delaware District Court in 214 F. Supp. at pp. 591-593 and leads to the same conclusion. It was clearly the intention of Congress to put pre-enactment purchasers and post-enactment purchasers on the same basis, that of the statutory sales price.

* * * * * *

CAMERON, Circuit Judge, concurring in part and, in part, dissenting:

The decision of the majority of the items designated "*1. Foreign Tax Credit Issue*" and "*3. Interest on Progress Payment*" accords with my own views, and in the decision on these issues I concur. The holding of the majority on the issue designated "*2. Cost Basis of Vessels for Depreciation*" goes so far afield of my own view that I am constrained to state my views in a brief dissent.

Admittedly, there is no clear statutory authority for the decision of the majority that Appellee's basis for depreciation of the vessels which form the subject of this litigation must be reduced by the $8,818,839.55 in dispute, which amount represents reductions in the *additional* amount of the cost of said vessels to be paid under the purchase contracts as originally executed. The majority appears to adopt the conclusion of the District Court of Delaware in *National Bulk Carriers, Inc.* v. *United States,* D. C. Dela. 1963, 214 F. Supp. 585. That court, basing its holding solely upon its reading of the legislative history of Section 9 of the Merchant Ship Sales Act of 1946, 50 U. S. C., Appendix, 1952 ed., Sec. 1735 states as its conclusion:

> "A decision for the taxpayer would be contrary to the equitable principles that motivated the Congress to act. A larger depreciation basis for wartime buyers for the same class of ships would give them a substantial competitive advantage over similar (sic) situated post war buyers. With the language and the background of the legislation in mind, the government must prevail." 214 F. Supp. at page 593.

The legislative history of this statute does not, in my opinion, support this conclusion. Indeed, the Chief Judge of the District Court himself recognized the uncertain area into which his opinion ventured when, in the paragraph preceding that above quoted, he said:

> "It is for the Supreme Court or Congress to conclusively determine this problem." Ibid. at page 593.

I find no such uncertainty or obscurity in the congressional intent on the point in issue. The basis of property for the purpose of computing depreciation is determined by statute, §113 (a), Internal Revenue Code of 1939, 26 U. S. C.:

> "The basis of property shall be the cost of such property; except that—"

There follow in subsections (1) through (23) enumerated exceptions to the quoted rule, none of which even remotely touches upon this problem.

> "These and the other provisions upon which they depend create exceptions to a general rule and should not be extended by implication or otherwise to situations not expressly provided for." (Referring to predecessors to §§113 (a) (1) *et seq.*) *Central National Bank*, 29 BTA 530.

When Congress intended that its acts authorizing the redetermination of the price of ships purchased under our various subsidized ship procurement programs would also determine the basis of property in a manner differing from §113 (a), *supra*, or would determine other factors affecting income tax liability of purchasers, it has always said so specifically.[1]

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[1] For example, §510 of the Merchant Marine Act of 1936 (46 U. S. C. 1160(e)):

> "No gain shall be recognized to the owner for the purpose of Federal income taxes in the case of a transfer of an obsolete vessel to the Federal Maritime Board or Secretary of Commerce under the provisions of this section. The basis for gain or loss upon a sale or exchange and for depreciation under the applicable Federal income-tax laws of a new vessel acquired as contemplated in this section shall be the same as the basis of the obsolete vessel or vessels exchanged for credit upon the acquisition of such new vessel, increased in the amount of the cost of such vessel (other than the cost represented by such obsolete vessel or vessels) and decreased in the amount of loss recognized upon such transfer."

And §510 of that Act (46 U. S. C. 1161):

> "The basis for determining gain or loss and for depreciation, for the purposes of Federal income or excess profits taxes, of any new vessel constructed, reconstructed, reconditioned, or acquired by the taxpayer, or with respect to which purchase-money indebtedness is liquidated as provided in subsection (g) of this section, in whole or in part out of the construction reserve fund shall be reduced by that portion of the deposits in the fund expended in the construction, reconstruction, reconditioning, acquisition, or liquidation of purchase-money indebtedness of the new vessel which represents gain not recognized for tax purposes under subsection (c) of this section."

§9(b)(8) of the Merchant Ship Sales Act of 1946, *supra*, (the statute construed by the majority opinion to support its conclusion) specifies how the income tax effect of its re-framing of the purchase price shall be treated:

> "There shall be subtracted from the sum of the credits in favor of the Commission under the foregoing provisions of this subsection the amount of any overpayments of Federal taxes by the applicant resulting from the application of subsection (c) (1), and there shall be subtracted from the sum of the credits in favor of the applicant under the foregoing provisions of this subsection the amount of any deficiencies in Federal taxes of the applicant resulting from the application of subsection (c) (1). If, after making such subtractions, the sum of the credits in favor of the applicant exceeds the sum of the credits in favor of the Commission, such excess shall be paid by the Commission to the applicant. If, after making such subtractions, the sum of the credits in favor of the Commission exceeds the sum of the credits in favor of the applicant, such excess shall be paid by the applicant to the Commission. Upon such payment by the Commission or the applicant, such overpayments shall be treated as having been refunded and such deficiencies as having been paid."

It seems, therefore, abundantly clear that Congress has uniformly spelled out any exception to the rule of §113(a), *supra*, which it intended to apply.

On the point here in issue, the House of Representatives did consider a bill which would have provided specifically such an exception, and the result Appellant seeks (see H. R. 3603, 79th Congress, 1st Session), which was not passed. The Senate likewise considered, and indeed enacted a bill including as §9(e)(1) thereof a provision which also would have produced this result. It provided:

> "If an adjustment in the purchase price of a vessel is made under this Section, the income and

> excess profits taxes of the vessel owner under the Internal Revenue Code for the taxable year within which the delivery of the vessel was made to the purchaser and for *subsequent taxable years,* shall be redetermined. For such purposes of redetermination *the vessel shall be considered as having been acquired at the adjusted* purchase price, and the income and deductions attributable to such vessel shall be determined as if this Section had been in effect on the date of such delivery." [Emphasis added.] See consideration of H. R. 3603, 79th Congress, 1st Session in the Senate, December 4, 1945 (Legislative day October 29, 1945).

However, in conference, this provision was eliminated, and the statute we are here considering was approved (See House Conference Report No. 1526, 79th Congress, 2nd Session, to accompany H. R. 3603, dated February 6, 1946) and subsequently enacted by both Houses as the Merchant Sales Act of 1946, *supra.*

Moreover, when the executive branch, acting by and through the Commissioner of Internal Revenue of the Treasury Department, undertook to write in by administrative action that which Congress had refused to enact, in Mimeograph 6366, 1949-1 C. B. 270, the 81st Congress, in H. R. 3419, passed by both Houses but vetoed by President Truman (see 96 Cong. Rep. P. p. 15, 79102), enacted a bill which provided the precise treatment here sought by Appellee.

I do not agree with the District Court of Delaware (in 214 F. Supp, page 593) that ". . . these statements are entitled to little or no weight" because of the holding of *Fogarty* v. *United States,* 340 U. S. 8. Here we have no effort of a much later Congress to supplant the views of its predecessor; but, to the contrary, the second Congress following, expressing itself through the *same* committees, supporting and implementing the act of the earlier Congress. It is difficult to conceive of a clearer exposition of legislative intent than the sum of the foregoing actions.

The Congress manifestly intends that §113(a), *supra*, shall be applied to determine the basis of these vessels; that the basis is "the cost of such property."

The word "cost" used in this context has a clear meaning:

> "The amount in value paid, charged, or engaged to be paid for anything bought or taken in barter." Webster's new Twentieth Century Dictionary, Standard Reference Works, 1956 Edition.

It is undisputed in this record that Appellee had paid in cash $16,235,446.21, on account of the purchase price of the subject vessels, prior to the redetermination of its price (R. 75, 83); that the Adjusted Basis of vessels traded in thereon was $175,876.40 (R. 75, 83); that Appellee paid the additional sum of $86,037.70 upon settlement of the adjusted price (R. 84), and that the mortgage debt to be paid thereon, after crediting thereto all adjustments, including the $8,818,838.55 here in controversy, was $10,182,779.04 (R. 79). The total paid or to be paid for these vessels is therefore $26,680,139.35. This is the "cost" and this is the basis under §113(a), *supra*.

When the foregoing is considered together with the comprehensively documented opinion of the Court of Claims in *Socony Mobil Oil Co., Inc., et al.* v. *United States*, 287 F. 2d 910, the decision of the District Court of New Jersey in *Barber Oil Corporation* v. *Manning*, 135 F. Supp. 451, and Judge Thomas' carefully considered opinion in this action below, a decision for Appellee appears absolutely compelled.

Therefore, believing that to hold otherwise represents a clear departure from the legislature's plainly express intention, I respectfully dissent from the majority's holding as to point 2, "Cost Basis of Vessels for Depreciation."

APPENDIX C.

Conflicting Opinion.

IN THE UNITED STATES COURT OF CLAIMS

(Decided March 1, 1961)

Nos. 168-59 and 169-59

SOCONY MOBIL OIL COMPANY, INC.

v.

THE UNITED STATES

Nos. 49-58, 50-58, 327-58 and 328-58

TEXACO, INC. (FORMERLY THE TEXAS COMPANY)

v.

THE UNITED STATES

Nos. 187-59 and 188-59

MISSISSIPPI SHIPPING COMPANY, INC.

v.

THE UNITED STATES

MADDEN, Judge, delivered the opinion of the court:

In these three cases the facts have been stipulated by the parties. All the cases present the same question of law and this opinion will apply to all of them. There is, in the case of the Texas Company, an additional problem not involved in the other two cases. That problem will be adverted to in due course.

The plaintiffs seek to recover Federal income taxes which they were required to pay because the Government fixed the cost basis, of ships owned by them, at a lower figure than that which the plaintiffs say was the correct figure, and thereby reduced the amount of the deduction for depreciation to which the plaintiffs claim they were entitled for the years in question.

The case of Socony Mobil Oil Company, Inc. is, in its essentials, typical of the three cases, and the facts of that case will be used in this discussion. The word plaintiff, when used without qualification, will refer to that plaintiff.

During the war years 1942, 1943, 1944, and 1945 the plaintiff bought from the United States Maritime Commission twelve ships, and paid for them a total of $28,204,659.59, mostly in cash but partly in old ships traded in by the plaintiff to the Commission.

On March 8, 1946, the Merchant Ship Sales Act of 1946, 60 Stat. 41, 50 U. S. C. App. (1952 ed.) §1735 ff., became effective. Section 1742 of the above Code citation is section 9 of the Act, which section is important in these cases.

The 1946 Act as a whole provided for the sale by the Government of ships which had been constructed for it. It prescribed formulae for setting "statutory sales prices" at which such ships would be offered for sale. In its section 9 it provided that purchasers of ships which had been sold by the Government before March 8, 1946, could apply to the Maritime Commission for an adjustment of the price which they had paid. If the adjustment was granted, a part of the higher price which they had paid would be refunded to them.

Section 9 cited above prescribes in detail the items which were to be adjusted if a prior purchaser applied for adjustment. The section is long and complicated and will not be reprinted in this opinion. Subsection (b) of section 9 says:

> Such adjustment shall be made, as hereinafter provided, by treating the vessel as if it were being sold to the applicant on the date of enactment of this Act, and not before that time.

The several paragraphs of subsection (b) provide for credits to be given by the Commission to the purchaser, and other credits to be given by the purchaser to the Commission, all of which credits shall enter into the adjustment. Paragraph (4) provides that the Commission shall credit the purchaser with the amount by which the price paid by the purchaser exceeded the statutory sales price set under the 1946 Act. Paragraph (5) provides that the Commission shall credit the purchaser with interest at 3½ percent per annum on the excess of the original purchase price over any trade-in allowance received, from the date of the original purchase to the date of the 1946 Act. Paragraph (6) provides that the purchaser shall credit the Commission with the amount of charter hire which the United States had paid to the purchaser for the use of the vessels between the time of the purchase and the date of the Act, and that the Commission shall credit the purchaser with the charter hire which the United States would have paid for the use of the traded-in ships for the same period.

Paragraph (8) provides that there shall be deducted from the charter hire credits in favor of the Commission the amount of Federal taxes paid by the purchaser upon the charter hire received from the Government but now credited back to the Government pursuant to paragraph (6). It also provides that there shall be deducted from the credits in favor of the purchaser the amounts by which the purchaser's Federal taxes have been reduced, during the interim period, by taking deductions for depreciation and amortization on the ships. The specific provision about such interim depreciation and amortization is in subsection (c)(1) of section 9.

Subsection (b)(8) says:

> If, after making such subtractions, the sum of the credits in favor of the applicant exceeds the sum of the credits in favor of the Commission, such excess shall be paid by the Commission to the applicant.

In the case under discussion, that of Socony Mobil Oil Company, the computation based upon the respective

credits in favor of the plaintiff and the Commission showed a net credit in favor of the plaintiff of $4,615,243.23, which sum the Commission paid to the plaintiff.

These cases, as we said at the outset, require us to determine the correct basis on which the plaintiffs were entitled to compute depreciation, for the tax years in question, upon the ships bought by them from the Maritime Commission before the enactment of the Merchant Ship Sales Act of 1946, the price of which ships was readjusted pursuant to the provisions of section 9 of that Act.

The Government's contention is that the basis of the ships is their "statutory sales price" as set by the 1946 Act. If a person who had bought no ships from the Commission before March 8, 1946 had bought these ships from the Commission after that date, he would have paid the statutory sales price for them, and that would have been his cost and his basis for depreciation. If these plaintiffs, having bought the ships in question before 1946, had decided not to apply for a readjustment of their prior purchases, which they were permitted to do by section 9 of the Act, but to leave the prior transaction undisturbed and to buy some additional ships at the reduced prices of the 1946 Act, they would have paid the statutory sales prices for the additional ships, and that would have been their cost and their basis of depreciation for the additional ships. They could have gone on taking depreciation on the prior purchased ships on their high cost basis.

In determining whether to apply for a readjustment of its prior ship purchases, the plaintiff Socony Mobil Oil Company could set its accountants to work with the several credit and debit provisions of the paragraphs of section 9. Their computations would show that, taking all the items into account, a section 9 readjustment would bring the company a check for $4,615,243.23. There would be, then, no difficulty in reaching a decision to apply for a section 9 readjustment. The application was made and the check was received.

Our task is to determine how much the ships cost the plaintiff. The plaintiff says that it paid $28,204,659.59 for the ships; that it got back $4,615,243.23 in the section 9 readjustment; that its cost was, therefore, $23,589,416.36. It concedes that that cost should be reduced by $6,565,741.95 for a reason not here in dispute, which leaves a net cost, claimed by the plaintiff, of $17,023,674.41.

The Government's position is that the plaintiff's cost was the statutory sales price of the ships which, the parties agree, was $19,804,682.30. It would deduct from that amount the undisputed $6,565,741.95 referred to above, and arrive at the figure of $13,238,940.35. The difference of $3,784,734.06 between the cost figures arrived at by the parties is the amount on which, the plaintiff asserts and the Government denies, depreciation is deductible for Federal tax purposes.

Section 23 of the Internal Revenue Code of 1939, 26 U. S. C. (1952 ed.) §23, permits a deduction for depreciation of property used in the taxpayer's trade or business. Section 113 of the Code, 26 U. S. C. (1952 ed.) §113, says:

> The basis of property shall be the cost of such property.

It would seem that if one has bought property and paid $10,000 for it, and the seller later offers to readjust the price, according to a complicated formula, and when the computation is completed, the seller gives back to the buyer $3,117.24, the property has cost the buyer $6,882.76. That being, in fact, his cost, it would seem to be his basis for computing depreciation, if the property is depreciable for tax purposes.

The Government does not deny that the plaintiff's depreciation should be based upon its cost. But it says that the plaintiff's "cost" for this tax purpose is not the difference between what it originally paid and what it got back in the section 9 readjustment. That means that the Government's asserted "cost" is not the economic, dollars-and-cents cost, but an artificial figure, legally deemed, for

this tax purpose, to be the cost though it is not in fact the cost.

Congress could, of course, have provided that a former purchaser of ships who desired to take advantage of the readjustment of price offered him by section 9 should, as a condition of the readjustment, obligate himself to compute future depreciation on a basis other than actual cost. Congress could have done this expressly, or by writing a text from which such an implication would necessarily result. Congress has not done so expressly, and we do not find that it has shown an intent to do so.

A bill was considered and rejected by the House of Representatives which would have, if enacted, supported the Government's position. See H. R. 3603, 79th Cong., 1st Sess. Instead, the House of Representatives passed a bill containing a section which was essentially like the one which was finally enacted as section 9. See H. R. 3603, 79th Cong., 1st Sess., in the Senate, October 3 (Legislative Day October 2) 1945 (as passed by the House on October 2, 1945). The Senate, however, enacted a bill containing a section which was similar to the one which had been rejected by the House of Representatives. See section 9 of H. R. 3603, 79th Cong., 1st Sess., in the Senate, December 4 (Legislative day, October 29) 1945. That bill contained a section 9(e)(1) which provided:

> If an adjustment in the purchase price of a vessel is made under this Section, the income and excess profits taxes of the vessel owner under the Internal Revenue Code for the taxable year within which the delivery of the vessel was made to the purchaser and *for subsequent taxable years*, shall be redetermined. For such purposes of redetermination *the vessel shall be considered as having been acquired at the adjusted purchase price, and the income and deductions attributable to such vessel shall be determined as if this Section had been in effect on the date of such delivery.* (Emphasis supplied.)

If this Senate bill had become law, the Government's position in these cases would be clearly correct. But in conference between the two houses, the House's version was adopted, with changes not here important, and that version was enacted as section 9. See House of Representatives Conference Report No. 1526, 79th Cong., 2d Sess., to accompany H. R. 3603, dated February 6, 1946. The Conference Report makes no mention of the omission of section 9(c)(1) of the Senate bill, quoted above, but does, at page 17, mention one modification which the conference had made in the House-enacted bill. The modification had to do with the year of taxability of the amount credited by the Commission to the prior purchaser as interest on his overpayment.

This legislative history shows that the committees of Congress gave minute attention to the tax consequences, current and future, of the readjustment authorized by section 9. The bill as enacted by the Senate had in it an express provision that the statutory sales price should be the basis for future depreciation. The conference omitted this provision, and the Act as passed omitted it. There is no room for an implication that Congress, having considered and omitted it, showed, by other parts of section 9, an intent to retain it.

The Treasury took the position which the Government takes here, that the statutory sales price is the correct basis for depreciation. Mimeograph 6366, 1949—1 Cum. Bull. 270. In 1950 the 81st Congress, 2d Session, passed H. R. 3419, which would have amended section 9(b) by adding the following paragraph at its end:

> From and after March 8, 1946 (the date of enactment of the Act), the cost basis of a vessel in respect of which the price adjustment is made shall be the undepreciated original purchase price reduced by the net amount of such adjustment in favor of the applicant resulting from the application of all of the foregoing provisions of this subsection.

Two Congressional committees which had considered section 9(b) when it was originally enacted considered the quoted amendment and explained in their reports that the position taken by the Treasury had made clarifying legislation necessary. See House of Representatives Report No. 1342, 81st Cong., 1st Sess., p. 2 and Senate Report No. 1915, 81st Cong., 2d Sess., p. 2. An expression of opinion as to the meaning of a statute, made some four years after the enactment of the statute by the same Congressional committee which had considered that statute at the time of its enactment, is an important circumstance for consideration in interpreting the statute. *Sioux Tribe of Indians* v. *United States*, 316 U. S. 317, 329.[1]

The President vetoed H. R. 3419. His veto message is in 96 Cong. Rec. pp. 15,791-2. The fact that the bill was vetoed does not detract from its weight as evidence of the intent of Congress and its committees in their drafting of section 9(b) in the 1946 Act.

Section 9, in its subsection (c)(2), provides that if the Government charters a ship of which the price has been readjusted under section 9, it shall not pay more per annum than 15 percent of the statutory sales price, and that if the Government loses a ship so chartered it shall not pay more than the statutory sales price, properly depreciated, for the

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[1] *United States* v. *United Mine Workers*, 330 U. S. 258, 281-282, is not to the contrary. That case said only that the opinions of several Senators, some of whom had not been members of the Senate when the legislation in question had been considered, and none of whom had been members of the Committee which had reported the legislation and which opinions were expressed eleven years after the legislation had been passed, could not "serve to change the legislative intent of Congress expressed" when the legislation had been passed. Similarly, *Rainwater* v. *United States*, 356 U. S. 590, 593, indicates only that an interpretation by one Congress of a statute passed by another Congress more than a half century before has "very little, if any, significance." See also the concurring opinion of Judge Littleton in *The Equitable Life Assurance Society* v. *United States*, Ct. Cl. Nos. 559-58-563-58, decided March 2, 1960, 181 F. Supp. 241, 245, and *A. P. Green Export Co.* v. *United States*, Ct. Cl. No. 126-59, decided December 1, 1960, 284 F. 2d 383, 386-7.

lost ship. We see nothing in these provisions except evidence that Congress was aware, in minute detail, of the problems that would be presented by section 9 readjustments, and provided specific solutions of those problems in the statute, and did not leave them open for judicial interpretation.

The readjusted price which the plaintiffs had to pay for their ships in order to take advantage of the readjustment offered them by section 9 was more than the statutory sales price. Neither the express terms of the statute, those terms in their context, nor the relevant legislative history indicate a legislative intent that the basis for depreciation of these ships should be an artificial, legally constructed figure different from their actual mathematically computed cost.

In the case of *Barber Oil Corporation* v. *Manning*, 135 F. Supp. 451 (D. N. J. 1955), the court rejected the Government's position, which was the same as its position in the instant cases.

As we said at the beginning of this opinion, there is an additional problem involved in the case of the plaintiff Texaco, Inc. That plaintiff's suit relates to its tax years 1946, 1947, 1948, and 1949. The Government has pleaded the statute of limitations as to the years 1946 and 1947. Timely claims for refund for those years were filed by the plaintiff. The Commissioner mailed statutory notices disallowing the claims. Section 3772(a)(2) of the Internal Revenue Code of 1939, 26 U. S. C. (1952 ed.) §3772(a)(2), provides that suits on such claims must be filed within two years after the date of the mailing of the notice of disallowance. But section 3774(b)(2) provides that the Commissioner of Internal Revenue and a taxpayer may make an agreement that the running of the statute of limitations shall be suspended during the pendency in court of a test case involving the question which has arisen between the Commissioner and the taxpayer. In the instant case Texaco, Inc. and the Commissioner made an agreement that the running of the statute "is hereby suspended from the date

the Commissioner signs this agreement to the date of final decision" in the case of *Barber Oil Corporation* v. *John Manning*, then pending in the United States District Court for the District of New Jersey. The *Barber Oil* case was the case cited above. Manning was a former Collector of Internal Revenue.

At the time this agreement was made, the District Court had rendered an initial decision against the Government in the *Barber Oil* case, with an opinion, as cited above. Thereafter the parties to that case settled it by agreement and presented to the court a stipulation that it had been so settled and that the plaintiff's petition should be dismissed with prejudice. The court endorsed such an order upon the stipulation.

If the suspension of the running of the statute of limitations was lifted on the day of the signing of the order, the plaintiff's suit was filed too late, as to the years 1946 and 1947. The plaintiff says that the "final decision" of the *Barber Oil* case, within the meaning of its agreement, did not take place until 60 days after the District Court's decision, 60 days being the time within which appeals may be taken from District Court decisions to the United States Courts of Appeals. The Government says that the District Court's order dismissing the case was the final decision because the plaintiff's petition was, with the plaintiff's consent, dismissed with prejudice. Of course neither party could have appealed from this order, without a showing of fraud or mistake, and the case was, in fact, finally terminated.

When the Commissioner made his suspension agreement with the plaintiff, he must have contemplated using the *Barber Oil* case as a test case. Section 3774(b)(2) referred to above, came into the revenue laws as section 608 of the Revenue Act of 1928, 45 Stat. 875. Its purpose, as stated in the Senate Finance Committee Report, Senate Report No. 960, 70th Cong., 1st Sess., was to "prevent a multiplicity of suits" while a test case was pending. The Commissioner,

when the *Barber Oil* case was decided against the Government, was in a position to pursue the test of the law by appealing to the United States Court of Appeals. Instead, the case was settled. We are not informed of the terms of the settlement, but it may be surmised that the Government paid some substantial sum to escape from the District Court's adverse decision.

It seems that such a premature termination of what was expected to be a test case would not have been anticipated by Texaco, the other party to the suspension agreement. Unless the Government advised it of the settlement, it would have had to be most diligent in watching the District Court's judgment docket in order to file its suit in time after the "final decision" of the test case.

We think that when the Commissioner has entered into an agreement for the suspension of the statute of limitations until the final decision in a test case, and thereafter participates in the frustration of the purpose of the agreement by preventing the test case from going to a decision on the merits, a fair interpretation of the agreement makes the suspension run until the earlier of the following two events: (1) The other party to the agreement has had notice of the premature termination of the test case, or (2) the time for an appeal would have expired, if the problem intended to be tested had been decided by the court in which the test case was pending.

The plaintiffs are entitled to recover, with interest as provided by law, and judgments will be entered to that effect. The amounts of recovery will be determined pursuant to Rule 38(c).

It is so ordered.

REED, *Justice (Ret.)*, sitting by designation; DURFEE, *Judge;* LARAMORE, *Judge*, and JONES, *Chief Judge*, concur.

Certificate of Service.

I, a member of the Bar of the Supreme Court of the United States, hereby certify that on the day of July, 1964, I served a copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit on the Respondent herein, by delivering a copy of the same to the Solicitor General, Department of Justice, Washington 25, D. C., and to David I. Granger, attorney of record for Respondent in the Court below, Department of Justice, Washington 25, D. C.

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Member of the Bar of the Supreme Court of the United States.